AMERICAN BAR ASSOCIATION JOVRNAL

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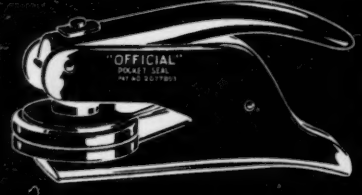

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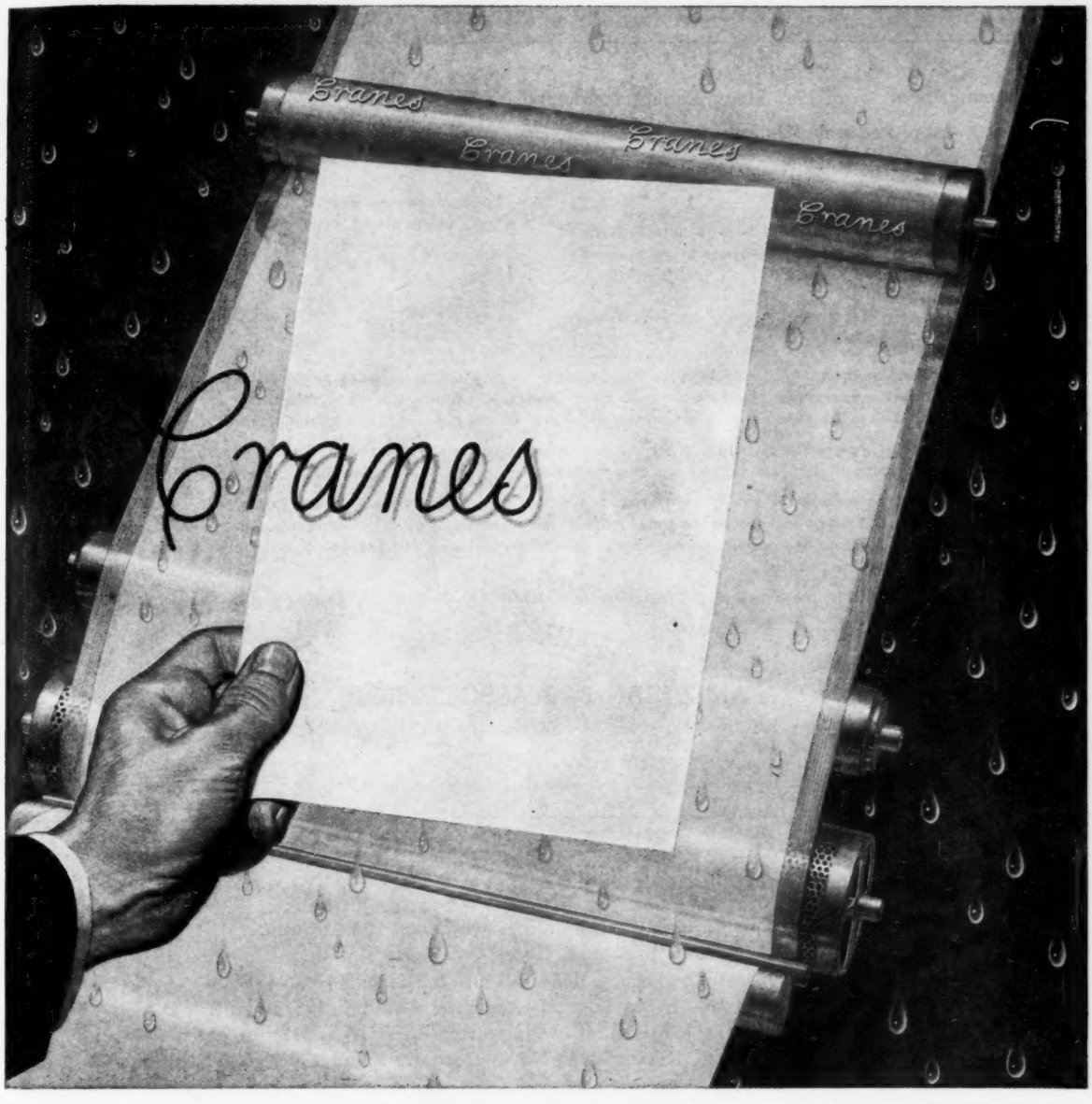

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No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

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Anyone wishing to enter the contest should communicate promptly with the Executive Secretary of the Association, who will furnish further information and instructions.

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American Citizenship:

Can Applicants Qualify Their Allegiance?

■ This article has been prepared in order to bring to the attention of the profession and the public, and the consideration of the Congress, a vital issue which has not yet received the thought and the public discussion which it deserves. The decision of the Supreme Court, by a divided vote in the *Girouard* case last April, overruled three earlier interpretations of the same laws by the Court and countless rulings by Courts of first instance and Courts of appeal, in naturalization cases. Does the present majority decision reflect a departure from the fundamental principles of a republican form of government? Does it create a situation which calls for action by the Congress to eradicate the consequences of mistaken "judicial legislation"? The *Girouard* case did not involve a partisan issue or a labor dispute. It reflected a pattern of thought which has recurred in December decisions under the Selective Service Act. It may therefore be used as a detached and objective standard. Our member-readers will recall that while he was reading his emphatic dissent in the *Girouard* case, the beloved Chief Justice Stone was fatally stricken. Questions posed in this article are accentuated by his last words to his profession and his country.

■ Prior to April 22, 1946, an alien who refused to bear arms in defense of this country could not be admitted to citizenship in it. On that date that historic rule was nullified and reversed. An applicant otherwise acceptable must now be admitted to citizenship even though he says he will not take up arms in defense of this country and our Constitution and government.

That change in the law was brought about by the decision of the Supreme Court in the case of *Girouard* v. *United States*.[1] By a vote of five to three the Court overruled three earlier decisions, saying: "We conclude that the *Schwimmer, Macintosh*, and *Bland* cases do not state the correct rule of law".

The authority and duty to specify the requirements for citizenship rest in the Congress, not in the Court. In each of the cases mentioned, the Court had before it a controversy as to the meaning of the language used by the Congress in the Naturalization Act of 1906, the Nationality Act of 1940, and the amendments of 1942. The Congress had provided that an applicant should prove "to the satisfaction of the Court admitting any alien to citizenship" that he had for a period of five years "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same", and had directed further that he should declare on oath that he would "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same".

In the three earlier cases the Supreme Court had held, according to what had seemed to be the plain intent of the Congress, that:

> Naturalization is a privilege to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes.
>
> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.
>
> Whether any citizens shall be exempt from serving in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the applicant, except as Congress provides.
>
> The substance of the oath has been definitely prescribed by Congress. The words of the statute do not admit of the qualification upon which the applicant insists. For the Court to allow it to be made is to amend the Act and thereby usurp the power of legislation vested in another department of the government.

Chief Justice Stone's Dissent

When the *Girouard* case overruled these three earlier cases, Chief Justice Stone dissented, although he had joined in the dissent in two of the earlier cases. In other words, in the *Macintosh* and *Bland* cases he had favored the granting of citizenship in spite of a reservation by the appli-

1. 66 Sup. Ct. 826; .. U. S. ...

cant regarding the bearing of arms. But in the *Girouard* case he was in favor of denying citizenship under such conditions. The reason for this change of view on the part of the Chief Justice is important. He said:

> A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the *Schwimmer* case, leads me to conclude that Congress has adopted and confirmed this Court's earlier construction of the naturalization laws.

The reasoning of the Chief Justice was supported by Justices Reed and Frankfurter. Mr. Justice Jackson was in Nuremberg.

Unsatisfactory State of the Law

In spite of the three earlier decisions of the Court and the absence of action by the Congress to change the interpretation given to the laws, five Justices nevertheless held in April that:

> The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to write it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

This is not a satisfactory condition of the law on a vital subject. Because it is a question of interpretation, it seems to be advisable and requisite that the Congress now make its intention and policy clear. It is not likely that the controversy will be ended by the *Girouard* decision. Trial Courts will still be required to exercise judgment upon varying facts. Such minority groups as the Seventh Day Adventists and the active pacifists generally will continue to seek citizenship on a reservation as to bearing arms; Jehovah's Witnesses will ask a qualification regarding any support of war; and other qualifications of the oath may be asked. The Immigration and Naturalization Service particularly has need to know what the will of the Congress is as to the admission of applicants who are unwilling to take the oath of allegiance as prescribed.

How the Question Came to Court

To many persons it has seemed strange that such a question ever came to the Supreme Court, in view of the statute. That it was considered four times seems less explicable. The issue could have been avoided. As the opinion in the *Girouard* case states: "The oath required of aliens does not in terms require that they promise to bear arms". In the *Bland* case the applicant refused to take the oath to defend the Constitution except with the written interpolation of the words "as far as my conscience as a Christian will allow". In other cases the issue arose when the applicant was asked: "If necessary are you willing to take up arms in defense of this country?" It was not necessary to qualify the oath or to ask the question.

Furthermore, no one was compelled to take the oath of allegiance. Aliens were free to preserve their religious scruples and forego citizenship, or they could accept citizenship and trust that the Congress would exempt conscientious objectors from active warfare as the Congress had done. The question was forced, however. And then because constitutional principles were dragged into the dispute and made much of by over-zeal on the part of so-called "liberals", the issue was magnified. For that very reason it seems to require now a firm and explicit answer.

No Questions of "Freedom" Involved

Before the final answer was given, the problem should be stripped of extraneous considerations. Participants in the controversy went far afield for arguments to support their preconceived notions of what the congressional intent ought to be. The opinions in the cases mentioned are weighted with references to constitutional principles regarding "freedom of thought" and "freedom of religion". Such considerations were forced and unnecessary. No rights were denied, no freedom restrained. Aliens have no inherent right to citizenship. It is offered on certain conditions as a favor. They can take it or leave it.

When reduced to its simple essence, the question is: What allegiance should be required of an alien asking for citizenship? What proof of loyalty should be required before an alien is honored with the privileges of naturalization? Mr. Justice Holmes in his dissent in the *Schwimmer* case injected the principle of free thought: "Not free thought for those who agree with us, but freedom for the thought that we hate". And then he added: "We should adhere to that principle with regard to admission into, as well as to life within this country". That is a natural and magnanimous view for a philosopher like Holmes. But it seems unlikely to be the prevailing view of our citizenship. The average American believes, we think, in the greatest possible freedom for American citizens and others, but he would not favor the granting of citizenship to one who offered only a qualified allegiance to the institutions by which such freedom is guaranteed.

Allegiance Should Be Unqualified

And there is much to be said in favor of such a view. A confession of faith does not mention doubts. The marriage vow does not carry exemptions. The oath of allegiance should not contain reservations. When one is asked to give assurance of loyalty, one should not quibble or insist on his own qualifications and reservations. When one of the sins of the time is that men show greater devotion to their business, to their labor organization, or to their political party, than to their country, it seems a gross error to foster and encourage a split fealty. At a time when factionalism, disintegration, and disrespect for authority are the great dangers, tolerance and so-called "liberalism" should not be encouraged to the disparagement of devotion to government. We do not have classifications or gradations of citizenship: Why

should America have grades or degrees of allegiance?

Practical Considerations for Allegiance

Furthermore, there are very practical considerations in favor of the average American's view. As was stated in the *Macintosh* case: "If one qualification of the oath be allowed, the door is open for others, with utter confusion as to the probable result". The privilege of the native-born conscientious objector to avoid bearing arms comes, not from the Constitution nor from any inherent right, but from the Acts of Congress. The applicant for the favor of naturalization should not be permitted to demand as a condition of his allegiance what natural citizens receive only as a grant. The *Schwimmer* case recognized that "it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises". Indeed, it is a basic principle of organized society, coming down from earliest times, that an individual may be compelled to bear arms in defense of the state. If our government should surrender that fundamental and historic right, how would it ever enforce a universal draft law, in case such a law became necessary, which may not be improbable under modern conditions of total war?

"Conscientious Objectors" to Bearing Arms

Men who had experience in administration of the Selective Training and Service Act of 1940, as members of draft boards, as jurors, or as judges, acquired a very strong suspicion, if not a conviction, that many who claimed the privileges of conscientious objectors were not in fact motivated by religious conviction but were dissembling for their own protection. There was something soft, effeminate, or furtive about many of them. They were frequently referred to by others as "yellow". Some were quite clearly the victims of a martyr complex. They posed and dramatized. Occasionally a true religious made his appearance. He stood out sharply from the others because of his vigor of character and true selflessness. In his nature was the spark that fired Daniel and the Apostle Paul. Such characters commanded respect; they asked no concessions, expected no coddling. The law should not be so extended that it encourages unworthy members of society to take advantage of it or so interpreted as to make an asylum of our country. The burden of enforcing the Selective Service Act was heavy enough as it was.

The commendable principle of freedom of thought and religion should not be so applied that it tends to pamper and pander to derelicts and degenerates. The power of the state to deal with them should be preserved. They should not be received into citizenship upon exceptions which limit the *imperium* of government.

Citizens and Aliens as "Objectors"

The reasons advanced for the exceptions contained in the Military Service Acts in favor of conscientious citizens do not come with good grace from aliens applying for citizenship. What in Congress is sound argument for liberality in the Selective Service Act as to citizens becomes mere rationalization, sophistry, and sentimentality when allegiance is the open question in Court. Religious conviction is worthy of respectful consideration. But an alien who asks the favor of citizenship and at the same time demands that he be exempt from the kind of service that was necessary to establish our form of government and may at any time be necessary to maintain it, and who shows a want of respect for such an obligation of citizenship, is hardly worthy of our regard. He should not be granted an indulgence, the refuge of our citizenship as a cloak and cover for his hostility to our republican form of government. Many of those who claim exceptions, even in becoming American citizens, would fight ruthlessly for a totalitarian collectivism.

There are times when force is necessary for the maintenance of order and the protection of society. This is not a perfect life. Evil is in the world. The object of just government is to bring evildoers into subjection to law. Maitland said: "The law has need of arms; Justinian knew it well". The Prince of Peace gave his blessing to the Centurion. When the great religious leaders have uniformly emphasized man's civil as well as moral obligations and have discouraged every attempt to plead loyalty to God as excusing faithful discharge of obligations to mankind, it is hardly becoming for those charged with the administration of the civil law to encourage the assertion of religious scruples as an excuse for lack of devotion or only a qualified allegiance to that state which has always stood, and still stands, as the champion of religious freedom against irreligious ideologies.

Tenets of the Majority Opinion

The disparagement which true liberalism is suffering today is due largely to the tendency of some of its self-avowed champions to carry it too far and into considerations where it does not apply. It appears then to be effervescing and spilling over. It ceases in such circumstances to command the respect of the common man. Such over-zealous champions of "liberalism" are like the athletes whose ardor impels them into offside play. Their cause is not advanced by such conduct. It suffers the penalty of being set back from its true goal.

Take, for instance, the following statements from the majority opinion in the *Girouard* case:

> Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those

> whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his role may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.

Those seven assertions do not involve a question of law but merely a judgment as to life—judicial legislation as to what the Congress *should* have intended as to the oath of allegiance. A test of their soundness would be to state them to the common man and get his reaction. What would a veteran of active military service say? If that is not a fair test, what would the man back of the plow say? Or the man in the mill or mine? Or the Main Street businessman? Their answers would not be set in judicial phrases, but they would make it quite clear that such aphorisms of indifference to allegiance do not ring true. The truth of the matter is that the refusal to bear arms cannot be idealized or justified without casting doubts on the righteousness and the wisdom of the soldiers' sacrifice. And the average American resents such aspersions. It is dangerous for the law to lose its common touch, its conformance to the prevalent sense of fairness and duty. The law then is like the mythological giant who lost his strength when his feet left the ground.

Justice Holmes advanced no such arguments. He said he did not share the optimism of the pacifists. His liberalism was too matter-of-fact for that. The Holmes dissent advocated freedom for thought that was hated. But the *Girouard* opinion embraces thought that is loved.

The Congress Should Speak Plainly

Now that the Supreme Court has reversed itself and the Congress, the Congress may well consider its duty to speak—not only to make its intentions clear and the law certain, but to lift the problem out of the specious considerations in which it has become involved.

If this country wishes to grant citizenship on a qualified allegiance, let it do so directly, not by inference, and let it do so without glamorizing pacifism. Let it be done by express grant and not upon the assumption that aliens have a right to it as a matter of principle, or that it is necessary to grant it in order to preserve freedom of thought and of religion.

Most Americans, however, will earnestly hope that the Congress will reaffirm the doctrines and reinstate the tests prescribed in the laws and in the earlier decisions of the Supreme Court, and say in emphatic language that the allegiance which citizenship requires is absolute and cannot be qualified. We shall not long have any freedom if the nation's fighting spirit becomes suppressed. As Lewis Mumford has said:

> He who under no circumstances and for no human purpose will resort to force, abandons the possibility of justice and freedom.

MEMORIAL OF THE LATE CHIEF JUSTICE STONE

Harlan Fiske Stone, the twelfth Chief Justice of the United States, and by virtue of that office Chairman of the Judicial Conference of Senior Circuit Judges, departed this life in the City of Washington the 22nd day of April, 1946.

The members of this Conference wish to testify their profound regret in the sad event and their great and abiding respect for his memory.

It is but just to say he was a jurist of great learning in the law, whose indefatigable industry led him to explore all the sources of the common law and the constitutional and international law to find precedent and justification in support of the reasoning of his great mind. In our association with him in the discharge of the duties imposed on this Conference he was always patient, sympathetic, cooperative, and his guiding hand was invariably useful and potent in leading the Conference to a right conclusion.

In all of his activities as a lawyer, as a judge, and as a public-spirited citizen, he demonstrated an unfailing search for truth as the cornerstone of his philosophy, and in his long and fruitful life there is not an ignoble memory in his path to place and power. No gift that nature bestowed was ever wittingly used by him in an unworthy cause. His sudden death has brought to each of us profound regret. We have lost a great leader and the Nation a pure and upright judge.

We tender to his family our sympathy, and the Secretary of the Conference is hereby requested to send them a copy of this minute.

Minute presented by Chief Justice Fred M. Vinson and adopted by the 1946 Judicial Conference

2

Rules of Civil Procedure:

The Supreme Court Adopts Amendments

▪ The Supreme Court has approved all but three of the amendments drafted and recommended by the Advisory Committee on the Rules of Civil Procedure for the District Courts of the United States. The three excepted amendments include those proposed for Rule 30, as to adversary access to an attorney's files, which were opposed by the votes taken in the Association's Assembly and House of Delegates. The approved amendments were transmitted to the Congress by the Attorney General in January. Unless contrary action is taken by the Congress, which is unlikely in view of the general approval of the changes, the amendments will take effect on September 1 or later in 1947, the exact date depending on the date of the adjournment of the present session of the Congress.

▪ The Supreme Court on December 27 adopted the amendments recommended by the Advisory Committee on Rules of Civil Procedure in its "Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States", dated June 14, 1946, except that the Court did not adopt the amendments proposed for Rule 25 (a) ("Substitution of Parties" in the event of death), Rule 30 (b) ("Depositions upon Oral Examination", which included the controversial provisions, which were opposed by the Association's Assembly and House as authorizing adversary access to certain types of papers in an attorney's files), or Rule 50 ("Motions for Directed Verdict and for Judgment"). Action as to these three amendments was postponed. Accordingly, the Rules amended were Nos. 6, 7, 12, 13, 14, 17, 24, 26, 27, 28, 33, 34, 36, 41, 45, 52, 54, 56, 58, 59, 60, 62, 65, 66, 68, 73, 75, 77, 79, 81, 84, and 86, and Forms 17, 20, 22, and 25.

Subdivisions (a) and (b) of Rule 80, Stenographers, were abrogated,

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leaving Subdivision (c) in force.

On January 2, Chief Justice Fred M. Vinson transmitted the amendments which the Court had adopted to the Attorney General, who reported them to the Congress at the opening session of the first regular session of the 80th Congress on January 3. They were referred to the Committee on the Judiciary of the House of Representatives and ordered to be printed as House Document 46.

The Chief Justice's letter of transmittal to Attorney General Tom C. Clark said, in part:

> I am requested to state that Mr. Justice Frankfurter joins in approval of the proposed amendments essentially because of his confidence in the informed judgment of the Advisory Committee on Rules of Civil Procedure.

Former Attorney General William D. Mitchell, of New York, is the Chairman of the Advisory Committee.

The amendments adopted by the Court will become effective in accordance with amended Rule 86 (b), which corresponds to Supplementary Rule A in the Advisory Committees Report. The provision is as follows:

> The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

The Never-Ending Struggle for Peace and Justice Through Law

■ The struggle for peace is the struggle for law and justice. It is a never-ending struggle. Law and justice can be developed and applied only through living institutions capable of life and growth. And these institutions must be backed by sufficient force to protect Nations which abide by the law against Nations which violate the law.

If we are going to build a regime of law among Nations, we must struggle to create a world in which no Nation can arbitrarily impose its will upon another Nation. Neither the United States nor any other state should have the power to dominate the world. . . .

Therefore, if we are going to do our part to maintain peace under law, we must maintain, in relation to other states, the military strength necessary to discharge our obligations. . . .

We have joined with our Allies in The United Nations to put an end to war. We have covenanted not to use force except in defense of law. The United States will keep that covenant.

As a great power and as a permanent member of the Security Council, we have a responsibility, veto or no veto, to see that other states do not use force except in defense of law. The United States must discharge that responsibility.

And we must realize that unless the great Powers are not only prepared to observe the law but are prepared to act in defense of the law, The United Nations Organization can never prevent war.

In a world in which people do differ as to what is right and wrong, we must strive to work out definite standards of conduct which all can accept. We must develop and build through the years a common law of Nations.

History informs us that individuals abandoned private wars and gave up their arms only as they were protected by the common law of their tribes and of their Nations. So I believe that in the long run international peace depends upon our ability to develop a common law of Nations which all Nations can accept and which no Nation can violate with impunity.

In the past international law has concerned itself too much with the rules of war and too little with the rules of peace. I am more interested in ways and means to prevent war than I am in ways and means to conduct war.

Unless we are able to develop a common law of Nations which provides definite and agreed standards of conduct such as those which govern decisions within the competence of the International Court of Justice and such as those which we hope may be agreed upon for the control of atomic energy, international problems between sovereign states must be worked out by agreement between sovereign states.

The United States has taken the lead in proposing the control and the elimination from national armaments of atomic weapons and other weapons of mass destruction under agreed rules of law.

These rules of law must carry clear and adequate safeguards to protect complying states from the hazards of violations and evasions. They must be sufficiently definite and explicit to prevent a state that violates the law from obstructing the prompt enforcement of the law.

If a Nation by solemn treaty agrees to a plan for the control of atomic weapons and agrees that a violation of that treaty shall be punished, it is difficult for me to understand why that Nation cannot agree to waive the right to exercise the veto power should it ever be charged with violating its treaty obligation. . . .

But international law in a friendly, peaceful world must rest upon something more than mere rules, something more than force and something more than fear. It must be made to rest upon the growth of a common fellowship, common interests and common ideas among the peoples of this earth.

—From the "valedictory" address of Secretary of State James F. Byrnes before the Cleveland Council of Foreign Affairs on January 11.

3

Cooperation with Laymen:

A Practical Program Needed by the Profession

by **Earl Warren** • Governor of California

■ The Section of Judicial Administration, under the leadership of Chief Justice Bolitha J. Laws, of the District of Columbia, has been exploring and developing a program for cooperation with non-lawyers, both individuals and organizations, in behalf of common objectives as to improving the administration of justice under law. Governor Warren came from California to Atlantic City, to make this contribution of support and "know-how" for that program. As a former Chairman of the Section of Criminal Law and former member of the House of Delegates (32 A.B.A.J. 424), and as a lawyer who has served his profession and State in many capacities, he spoke from a varied experience. Many of his suggestions were specific. He told of things which State Governments and State and local organizations are doing, in cooperation with the Bar. "Laymen" is a poor phrase of identification (33 A.B.A.J. 47) for those whose cooperation the Bar seeks to enlist, but we use it until a better term is devised—perhaps "cooperation with the public" is more descriptive and inclusive. Chief Justice Laws strongly commended this address to the *Journal* for publication and to our readers for their thoughtful study.

■ I have come a long way to discuss a greater degree of cooperation between the bench and Bar, on the one hand, and the public on the other, as a means of improving the administration of justice in our country.

We are living in an age when people everywhere are questioning many of the things they have long taken for granted. They are asking, and in some cases demanding, a greater participation in the things that affect their welfare. They have become more conscious of the existence and the operation of their government and of things closely related to government.

This stepping up of public interest has been going on for many years. We find today, more than ever before, that the public is getting away from its attitude of detachment. It not only wants our governmental institutions to serve its needs, but it insists on taking a hand in making them do so. This is a sign of the times.

The surprising thing, to me, is that this tide has not reached the administration of justice before this. Perhaps the reason is that people have been finding their way, and have been turning their attention to other fields they believe to be more immediately bound up with their lives—and more urgently in need of scrutiny.

Nevertheless, the tide is surely running. I am glad—and agreeably surprised—that the legal profession, so long looked upon as conservative, so often ridiculed for being chained to the past, is now, on its own initiative, concerning itself with its relationship to the public.

The American Bar Organizes for Cooperation

The American Bar Association has already set up two of its committees to carry on this program for cooperation with laymen—one of them composed exclusively of laymen. Judge Bolitha J. Laws, Chairman of this Section on Judicial Administration, has been demonstrating in his own District of Columbia that the bench and Bar *can* bring about a greater degree of cooperation with the public by calling men and women from the ranks of labor, business, and the professions, into the Courts to see what the administration of justice is all about—and to give their suggestions and their help for its improvement.

If carried out in all of the States of the Union—and in the local communities—this program although a new departure for the legal profession, will speed the day when the

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administration of justice will be regarded in the United States less as a baffling mystery and more as a familiar and well understood American institution.

This proposal for greater cooperation with laymen is based on a somewhat belated recognition of the need for more general understanding that the administration of justice is *not* a vested monopoly of lawyers and judges, but on the contrary is the property of all the American people— a system designed for the protection of their personal and property rights in a free and orderly society.

Millions of Americans go through their lives without ever coming into contact with any phase of the administration of justice—either civil or criminal. To these people, the Courts seem far removed and seem to have little bearing on their lives. Yet the fact is that our American Court system is inseparably connected with the lives of all our people, whether they use it or not, in much the same way that the fire department functions for the protection of homes which never burn.

Our System of Justice Is Fundamental

Today, more than ever before, it is becoming dramatically apparent to observant people that the administration of justice as we have it in America is the fundamental distinction between our country—living under a rule of law—and those unfortunate countries that have been living under the rule of a clique of men.

This fact seldom occurs to many Americans simply because they are unfamiliar with the law in action. They have come to think of the administration of justice as something over which judges and lawyers have assumed complete control, and many people are pretty well convinced from the little they see and the many things they hear that the legal profession has not done such a good job.

The law's delays, the language of the courtroom, the rigamarole of procedure, ponderous law books, ancient precedents, legalistic objections—all of these things combine to make a picture of the Courts and the legal profession in the mind of the average man. I feel confident that most of us will admit that we ourselves, as a profession, have been largely responsible for these popular impressions, because we have done little to correct them or to improve the practices which fix them in the public mind.

This state of affairs is not good—either for the legal profession or for the public. Lack of public understanding and confidence—unless remedied by action emanating either from the legal profession or the public—will inevitably permit a vital American institution to deteriorate.

Serious Departures from American Ideas of Justice

This is why all of us should be stirred and minded to take our part in furtherance of this program of the legal profession — a program for making America a partner in the firm.

While it is true that up to this time public dissatisfaction has not developed to the point of open protest, we have only to look around us to discover how far the American public is drifting away from its traditional system for the orderly and impartial administration of justice.

Whenever there is a job to be done through government to meet some acute need, a new agency is created; and it administration, which includes many judicial functions, is placed in some new board or commission — not a commission of judges or lawyers, but rather of laymen who are deemed to be experts on the particular subject and who will be free from normal legal procedure.

This has resulted in a myriad of administrative boards and commis-

sions. The decision of these tribunals are subject to very limited review by the Courts; and in practice their rulings are usually accepted as final by citizens who do not go farther, either because of a lack of means or an unwillingness to become involved with Court procedure.

This system of administration, of course, has some justification and certain advantages. It is a response to the requirements of a busy world for summary and swift determinations by specialists who are expected to see that the laws are properly administered and promptly applied.

"Administrative Justice" Degenerates

On the other hand the process, which incorporates the role of investigator, prosecutor, and judge in the same individual, often degenerates into something akin to a "Kangaroo Court." There is no doubt, however, in my mind that the trend in this direction has been largely due to a widespread belief that our regular Courts are too slow, too expensive, too out of touch, to do the job.

Lawyers have long been concerned about the indiscriminate expansion of this system and the abuses it has developed. Laymen themselves have come to describe and decry the general result as the evils of bureaucracy.

The lawyers are thinking of the situation in one way and the public in another. It is about time for the legal profession and the public to get together on their thinking.

This is a fundamental American problem in which both lawyers and laymen have an interest, and to the solution of which both must contribute. Together they will have to determine to what extent this change is good and beyond which it will be bad for this country.

Judicial Decisions by Executive Branch?

Eventually we will have to decide how far we should entrust what are really judicial decisions to appointees of the executive and take them away from a traditionally independent and impartial judiciary.

The public is hardly aware that the legal profession has been working on this problem for years, and this lack of public understanding often leads laymen to believe that the objectives of lawyers are limited by their professional viewpoint and self-interest.

We have recently tried to remedy this situation in California, where we have about forty such administrative agencies in our State government.

Efforts for Remedy in California

I worked with the State Bar and our Judicial Council for the establishment of a division of State government with continuing responsibility for the fair, orderly and uniform conduct of hearings before these tribunals.

Together we worked with the public. We worked with the boards and commissions themselves. Eventually we came out with agreement among all concerned.

I am happy to say that, as a result of this approach, our efforts were successful. The Legislature also agreed, and California has become the first State in the Union to adopt this reform. I am sure, however, that we were successful only because the public was consulted. It was cooperative when it realized that California's Administrative Procedure Act, enacted in 1945, was designed to prevent the abuses of bureaucracy and to eliminate the spectacle of "Kangaroo Courts."

This is just an example of the kind of progress that can be made if the legal profession and the public will work together.

The Public Can Help Reform Abuses

There is a very definite place in the administration of justice for the business "know-how" — the practical "horse-sense," if you will — of the American public — qualities that have been so effective in the development of this country.

For those who doubt the usefulness of public participation I recall that the strongest impetus for reform of Court procedure has come, not only in this country but in England, not from judges or lawyers, but from laymen whose patience with Court congestion and delay had become exhausted.

During the early 1930's the London Chamber of Commerce, the Boston Chamber of Commerce, and the Merchant's Association of New York, made their own independent investigations of Court conditions; and in each case their recommendations were constructive, and remarkable reforms were obtained, either from the Courts themselves or from the legislatures. The expansion of the use of the Judicial Council can be largely attributed to this influence of laymen.

As a matter of fact, one State of the Union — Texas — has already gone so far as to require by law that its Judicial Council shall have at least two laymen among its members.

Information and Judgment from Laymen

It seems to me that business men, working with the Bar Associations and the Courts, should be able to tell the profession why they would often rather sacrifice their claims than submit to what they conceive to be the delays, the costs and the complexities of Court procedure.

Representative groups of working men and women would undoubtedly be able to shed light on why the Courts of this country have received comparatively little recognition as appropriate forums for the adjudication of many kinds of industrial controversies.

A cross-section of the public would help us determine whether or not the legal profession, which holds within its ranks so much technical knowledge of the rules of the game, is actually bringing its essential service within the reach of all Americans who need it and would like to use it.

Specific Fields of Cooperative Action

Civic organizations could enlighten us on the reasons for the inability of traffic Courts and other enforcement agencies to stop the mounting wave of accidents and deaths on the streets

and highways of America.

This very situation has been a most disturbing one to us in California. Only last month I turned to our State Bar for help. I asked it to take part in a crusade for public safety, to re-examine our traffic laws, to check our methods of handling traffic violations, both on the highways and in the Courts.

In the field of juvenile delinquency, welfare agencies have a wealth of practical experience with which to help those Courts that daily face an astounding number of youngsters whose delinquency poses one of the saddest problems of American life.

In my own State we have what is called the California Youth Authority, charged with the responsibility for dealing with young offenders under 21 years of age. This Youth Authority — entirely apart from its correctional and custodial work — has been trying to get at the preventional side of this problem by bringing our juvenile Courts into closer cooperation with other community agencies. We have made some progress, but the surface has only been scratched.

Laymen could tell us a great deal more about our criminal Courts which so many lawyers and judges spurn as being unworthy of their talents.

Improving the Administration of Justice

The average person comes in contact only with the inferior Courts where there is often a lack of dignity and sometimes only a superficial veneer of justice. I believe the laymen could tell us something about improving the administration of justice in these Courts that grind out so much of the daily grist of the mill of justice — particularly in view of the fact that judges on the higher Courts, and the lawyers in this American Bar Association, rarely if ever see such a courtroom.

Then, there is the need for familiarizing people with their obligations as jurors, with their duties as witnesses and their rights as litigants.

In this field the Courts have not been sufficiently close to the public. They have not done a sufficiently good job of public relations to make jurors, witnesses and litigants feel that they are a real part of the administration of justice. Too often judges have assumed that people are already properly instructed. They have too often neglected to extend those courtesies and conveniences that will help citizens do their part consistently with their own busy lives.

My own experience in Court for a quarter of a century has left me with the conclusion that miscarriages of justice result more often from the bewilderment of witnesses on the stand than from intentional deception — and that erroneous verdicts result more often from the confusion of jurors than from their prejudice.

Only by bringing people in, to get their attitude, their problems and their suggestions, will we be able to correct these deficiencies.

The Profession Needs A Long-Range Program

There is a great deal to be done. It cannot be done overnight. This is a long-range program, and the progress will be slow.

But in my opinion the value of future cooperation with laymen can be demonstrated by a review of the long struggle that has been made in the past to attain a decent degree of cooperation, even within the legal profession itself.

The history of the legal profession shows that for many years lawyers lived and practised pretty much to themselves. They were individualists, and at first gave little attention to the profession as a whole — much less to its relationship with the public.

There were no Bar Associations — even in the local communities — merely a few lawyers' clubs in which, to quote an historian of the law, "gentlemen of the profession met once a year, enjoyed each other's society, ate a good dinner, passed some resolutions, accumulated a small deficit, and adjourned."

After the Civil War, the founding in 1870 of the Bar Association of the City of New York opened a period of cooperation among lawyers which has proceeded with acceleration to the present day.

I think it is worthy of note — and evidence of the willingness of the legal profession to render public service — that the first organization of lawyers into a Bar Association came through an effort of the lawyers of New York City to wage war against the notorious Tweed Ring, which at that time had brought public service and the administration of justice to their lowest ebb.

The Organized Bar Has Made Steady Strides

The American Bar Association was founded in 1878. In the beginning there was little effort to improve the profession or the administration of justice, but it is significant that the original letter of invitation sent out by Judge Baldwin, the real founder of this Association, stressed the point that it could be made an agency "for great service."

Since that time the legal profession, through local, State, and national, Bar Associations, has been able to make steady strides toward this goal of public service.

It has worked to improve the legal profession itself by establishing higher educational standards and stricter ethical requirements.

It has made a laborious and a very valuable contribution to the public by encouraging and bringing about uniformity of state laws.

It has tackled the stupendous work of restating the common law, in an effort to bring greater clearness and certainty to principles that had become obscured by an accumulation of precedents.

It has worked with the law schools of the country in the field of legal research, in an effort to bring the administration of justice more into keeping with changing social and economic conditions.

Under the leadership of the late Judge Benjamin Cardozo, it set out to bring judges into the field of cooperation by the establishment of the Judicial Councils we now find in

every State, to better organize the work of our Courts.

Since 1938 the American Bar Association has been hard at work on a specific and constructive program of procedural reform.

Much Remains To Be Done

It is true, therefore, that a great deal has been accomplished during recent years as a result of cooperation among lawyers, judges and law teachers, but few of us would be willing to deny that there is still a great deal to be done to bring the administration of justice to a point that will foreclose public criticism and capture public confidence.

The most we can say is that the legal profession has now attained a sufficient degree of cooperation within its own ranks to justify a program of public participation that will help us to expedite and complete our work.

The legal profession is a learned profession. The public has a right to look to it for essential service and for leadership. The experience, the knowledge and the skill of the profession are in a sense a public trust. We must recognize our obligations and seize all of our opportunities for taking part in the up-building of this country. This means that we must not hesitate to work closely with laymen in every field where cooperation will bring about better understanding and practical results.

The Symbol of the Association's Gavel

It is a very interesting and very significant thing, to my mind—that the history of the gavel wielded by the President of this Association symbolizes the obligation of the legal profession for public service.

At the first meeting of the American Bar Association at Saratoga Springs in 1878, the founders discovered that everything was complete for meeting – except a gavel for the chairman. The secretary was sent across the street to a little hardware store and there he bought a carpenter's mallet, for seventeen cents. That carpenter's mallet, split and worn and repaired through the years, is still wielded by the President of this Association.

Consistent with the symbolism of this gavel – a carpenter's mallet – we may well regard this program for closer cooperation with the American public as one of our great responsibilities and one of our great opportunities.

Our Cooperation Is Essential to Our Form of Government

We who belong to the legal profession, we who have devoted years of our lives to the administration of justice – some as judges, some as lawyers, and many as public officers – understand, better than most laymen, how essential this process is in a democracy.

We should thrill, it seeems to me, at this proposal for working closely with those for whose protection our system of justice was established.

America cannot be held together merely by the operations of the market place or solely by the letter of the law.

As a democracy its strength depends upon the willingness of people to live and work together in a spirit of unity.

Recognizing this, we of the legal profession, the craftsmen of the administration of justice, will derive our greatest satisfaction from working in this spirit of unity with those for whom we build; and what is more, we will build more usefully and enduringly – not for ourselves alone, but for our country – the hope of the world.

An Earnest American's Creed for Today

■ "Now in the evening of my life, I reaffirm my faith in this country of ours—this infinitely patient, this quick-rewarding, this slow to anger, bold, independent, just, and loving Mother of us all.

"To uphold her, we oppose dictatorship of the Right or of the Left. We oppose despotism. We oppose totalitarianism. We oppose slavery, whether imposed by the State or imposed by the individual. We are ready for change when change is marked by wisdom. We are consecrated to the pursuit of happiness, which means the betterment of man. Some of our qualities have been slow to mature, but they are growing. I am proud of our virtues and certain that our faults are under correction.

"I know of no other way to widen our horizons than by the preservation of free initiative, but with it must go responsibility for the preservation of full opportunity—political, religious, social and economic.

"I know no better way to preserve these rights than by democracy—an ever-deepening, ever-widening democracy—a democracy that gives us, as a poet phrased it:

" 'Ancient rights unnoticed,
As the breath we draw:
Leave to live by no man's leave,
Underneath the law.' "

—Bernard M. Baruch, at Freedom House, New York City, on October 8, 1946.

4

The Higher Law:

Reaction Has Permeated Our Legal Thinking

by **Harold R. McKinnon** • of the San Francisco Bar

■ Before the Judicial Conference convened by Senior Circuit Judge Francis Garrecht, of the Ninth Circuit, in San Francisco, a scholarly and stimulating address was delivered by Harold R. McKinnon, of the San Francisco Bar. From many judges and lawyers in various parts of the United States, the *Journal* has received requests which led to its present publication. His thesis is that the widespread rejection of moral and spiritual bases for law is not "liberal" or "progressive", but is the essence of reaction—historically, and by the experience in other lands, the easy road to totalitarianism. Mr. McKinnon is a member of the law firm headed by Roy Bronson, has been active in State and local Bar organizations, and is a member of the new Advisory Board of the *Journal*.

"What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."

Justice Benjamin N. Cardozo in
The Nature of the Judicial Process

■ It is a paradox that at a time when this country is beset with many fears, the most fearful thing of all is something of which the country is generally unaware. It is the fact that while this country is traditionally democratic, the prevailing teaching of its political and legal philosophers is essentially anti-democratic and totalitarian.

This is so because this teaching denies three essential elements of democracy and thereby affirms three essential elements of totalitarianism. It denies that there is a moral law which is inherent in human nature and which is therefore immutable and to which all man-made laws to be valid must conform. It denies that by virtue of this law man possesses certain rights which are inherent and inalienable and therefore superior to the authority of the state. It denies that the purpose of government is to secure these inherent and inalienable rights. It asserts that because there are no immutable principles of human conduct, there is no ultimate standard of justice and the lawmaker is responsible to nothing but his own unfettered will. It asserts that since there are no natural rights, all man's rights come to him from the state, and what the state grants, the state may take away. It asserts that since man possesses no natural, inherent rights, the purpose of government is not to secure such rights but rather the purpose of man is to serve the state.

This teaching nullifies the Declaration of Independence, the preamble of the Constitution, and the Bill of Rights. It nullifies twenty-five hundred years of progress in political and legal theory and re-enacts in the present age some of the worst political and legal errors of ancient times. It is indistinguishable, in its origin and its logical effect, from philosophies which characterized lands against which we have just fought the bloodiest war in history.

If these statements may be considered the headnotes or captions of my brief, I am prepared to establish their truth. Since what is at stake is nothing less than the basic principle of justice, it may be fitting to consider this teaching and the only possible antidote for the intellectual nihilism and the political and legal deterioration which it represents.

Decay of Belief in Natural Rights

In a book published by him about half a century ago, A. Lawrence Lowell—then a young man, and later to become President of Harvard University—said that the idea that man "is endowed by nature with certain legal rights which he cannot, or at least which he never did, surrender,

. . . has fallen into discredit, and been abandoned by almost every scholar in England and America."[1] Moreover, since we took the doctrine of the natural law from Europe at a time when it was in process of decay, the paradox was, as Lowell elsewhere pointed out, that having gained our independence with that doctrine, we then discarded it and adopted the opinions of the vanquished.[2]

What Lawrence Lowell said in 1889 is true today, except that the philosophy to which he refers has become more deeply entrenched, more militant, and by virtue of its conquest of American education, vastly more effective in its propaganda. Let me illustrate the position which this teaching occupies in American education by referring to the convictions of the man who is conceded to be the dean of American education and probably the most influential figure in its entire history. He says: "The intellectual basis of the legal theory of natural law and natural rights has been undermined by historical and philosophical criticism."[3] This crisp dogmatism is reflected in the writings of the most prolific textbook writer in America today, an educator whose philosophy is molding the minds of millions of our children. In his textbook treatment of American history, a book designed for the use of children from eleven to thirteen years of age, this writer quotes Jefferson's historic statement that while the will of the majority is to prevail, that will to be rightful must be reasonable and must respect the equal rights of the minority; and he then complains of that statement on the ground that it is an example of undemocratic reactionaryism![4]

Reaction Permeates the Social Sciences

As might be expected, this teaching has borne fruit. It permeates all the social sciences. Let me refer to two, politics and jurisprudence.

First, let us look at political theory. One of the leading political scientists in this country today, in a book recently published by him, says: "There are, of course, no such things as inherent and inalienable rights. They are purely a figment of the imagination, wish-fulfillment in political thinking. . . . Only by collective action can men lay down universal rules of conduct and give them body and viability; the attempt to trace human rights to any other source is sheer fantasy. . . . Popular sovereignty is a doctrine that goes inevitably with the theories of social contract and natural rights. When Thomas Jefferson wrote in the Declaration of Independence that all governments derive 'their just powers from the consent of the governed' and Abraham Lincoln in the Gettysburg Address spoke of 'this government of the people, by the people, and for the people,' they were merely giving utterance to what seemed to them to be self-evident truths."[5]

Another prominent author on this subject maintains that there are no absolute ethical limits to the state's power, and that the individual has no inherent, absolute rights which belong to him as a person and which therefore may not be infringed by others. Accordingly this author contends that the state may legitimately exercise its controlling power for the rendering of whatever affirmative aid it can for the advancement of the welfare of its citizens, and that "whatever state action will tend to secure this end is ethically justified", and "If this can best be done by establishing a socialistic or even a communistic regime, this will be ethically justified."[6]

HAROLD R. McKINNON

Another modern political philosopher of note, in a book on this subject, says: "Most of the best thinkers on politics of the present day, I believe, will agree that there is no such thing as a natural right. Each man may do things, ought to do things that will be for the benefit of the community, but he has not the right to demand anything from the community. Moreover, the criterion of what is for the benefit of the community at large must be settled by the community itself, not by any individual. . . . The citizen, then, may and must do what the community determines it is best for him to do . . . He must not do what the state forbids . . . (and) we may not properly speak of a natural right as opposed to the power of the state."[7] Please note that here is the quintessence of total-

1. *Essays on Government*, Boston and N. Y., Houghton, Mifflin & Co., 1890, page 193. Examples of such rights are enumerated by the U. S. Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390, 399, where the Court declared that the liberty mentioned in the Fourteenth Amendment denotes "not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

2. *Harvard Law Rev.*, Vol. II, pages 70 ff.

3. John Dewey, quoted in *Freedom, Its Meaning*, Ed. by Ruth Nanda Anshen (N. Y.: Harcourt Brace & Co.—1940), page 479. It goes without saying, I hope, that my opposition relates to the ideas and not to the persons of Professor Dewey and the other authors whom I quote. They themselves have dealt vigorous blows against traditional concepts which they think erroneous. Any counter-blows contained in this article are similarly aimed against a target of ideas and not against their authors.

4. Harold Rugg, *America's March Toward Democracy* (Boston: Ginn & Co.—1937), pages 155, 156.

5. Chester C. Maxey, *Political Philosophies* (N. Y.: Macmillan Co.—1938), pages 207, 208. This work lists its author as Miles C. Moore Professor of Political Science, Whitman College. Professor Maxey was formerly Assistant Professor of Political Science at Oregon Agricultural College, Supervisor of the Training School for Public Service in the New York Bureau of Municipal Research, Associate Professor of Political Science at Western Reserve University, and author of various books on government and political science.

6. Westel W. Willoughby, *The Ethical Basis of Political Authority* (N. Y.: Macmillan Co.—1930), pages 283, 284, 295, 296. Professor Willoughby is

itarianism. The citizen has no rights *from* the state; he has a duty *toward* the state, to do whatever the state determines is for the benefit of the state; and that determination is absolute and not open to question by him, and it is unrestrained by any natural right which is inherent in him as an individual. And this is not Nazi Germany; it is not Fascist Italy; it is not Communist Russia. It is America. It is an American university professor, an American author, an American public official.

Totalitarian Philosophy Permeates Our Legal Theory

The same philosophy permeates our legal theory. One of our noted legal philosophers says that "Natural law and an ultimate standard of justice . . . are examples of illusion on illusion."[8] Another such philosopher, author of a textbook on jurisprudence which has gone to many editions, teaches that the source of the validity, as well as of the obligatory character of law is the force which is lent to it by the state.[9] Another admonishes us to "banish from our professional tenets the absurd dogma 'a government of laws and not of men.' "[10] Another complains of statements of justices regarding inalienable rights, fundamental rights and rights which grow out of the essential nature of all free governments, and in respect to such statements says that "the premises upon which they are based have been abandoned by thoughtful men for over a century, (and) that those statements are against the vast weight of direct authority."[11]

Another such author sums up the situation when he says: "To defend a doctrine of natural rights today, requires either insensibility to the world's progress or else considerable courage in the face of it. . . . everyone who enjoys the consciousness of being enlightened knows that (doctrines of natural rights of man) are, and by right ought to be, dead. The attempt to defend a doctrine of natural rights before historians and political scientists would be treated very much like an attempt to defend the belief in witchcraft. It would be regarded as emanating only from the intellectual underworld. . . . in this country only old judges and hopelessly antiquated textbook writers still cling to this supposedly eighteenth century doctrine. . . ."[12]

And another of our contemporaries, a holder of important public offices and author of numerous publications upon this subject, maintains that so-called fundamental principles of law which arise out of a moral order and which limit the power of the lawmaker constitute a dream world invented by man because of his inability to find comfort without such a logical heaven, and that the attitude expressed when Coke informed King James that there was a law above the King was a result of this craving for a moral order logically supported.[13]

Unchallengeable State vs. Enduring Principles

Such, then, is the portrait of contemporary theory on this all-important subject. It has been summed up by Dean Roscoe Pound when he said that the cycle is now complete and we are back to the state as the unchallengeable authority.[14]

In view of this situation, we may well take heed of the warning of Montesquieu, that the beginning of a nation's decadence is when it loses sight of the principles upon which it is founded.[15]

In our case, what are those principles? They are the principles of the natural law. Volumes could be written upon the subject, but I must content myself with a very brief statement.

The basic element of the doctrine is, that by virtue of his nature, man has an awareness of right and wrong. It is not something communicated to him by his fellowman, but rather it is something inherent in him as a rational being, and because of that fact it is called the natural law. Since it is a part of his nature, it comes from the Author of his nature—namely, from God. It is not the result of a process of reasoning; rather it is an intuitive awareness of moral obligation. It is something written upon the tablet of his conscience by his Creator. Because it is a principle of human nature, it governs all men at all places and at all times and is essentially immutable. It applies to

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the author of numerous books relating to political and legal science, was once Associate Professor of Political Science at Stanford University, was Lecturer at George Washington and Princeton Universities, and was Professor of Political Science for thirty-seven years at Johns Hopkins University.

7. Jeremiah W. Jenks, *Principles of Politics—From the Viewpoint of the American Citizen* (N. Y.: Columbia Univ. Press—1909), pages 40, 41, 44. Professor Jenks was at various times Professor of Political Science and Economy in Knox College and in Cornell, Indiana and New York Universities, Chairman of the Board of Alexander Hamilton Institute, holder of numerous important government posts, domestic and foreign, and author of numerous works on politics, economics and education.

8. Albert Kocourek, *My Philosophy of Law, Credos of Sixteen American Scholars* (Boston: Boston Law Book Co.—1941), page 175. Professor Kocourek is listed as Emeritus Professor of Law, Northwestern University, and author of *Jural Relations* and *Introduction to the Science of Law*.

9. Thomas Erskine Holland, *The Elements of Jurisprudence* (Oxford: Clarendon Press, 13th ed. —1924), page 83. This author is an Englishman, but his book is widely used in America, and his teaching on this point is in harmony with the prevailing theory.

10. Joseph Walter Bingham, *My Philosophy of Law* (cited above), page 16. Professor Bingham is listed as Professor of Law, Stanford University, and author of various articles on jurisprudence. As against this contention of his, one may cite the motto carved on Langdell Hall in the Harvard Law School: *Non sub homine sed sub Deo et lege*.

11. Robert P. Reeder, "Constitutional and Extra-Constitutional Restraints," *University of Pennsylvania Law Review*, May, 1913.

12. Morris R. Cohen, *Jus Naturale Redivivum, The Philosophical Review*, November, 1916. In spite of the matter above quoted, Professor Cohen is critical of the positivism which denies the normative character of law. In this respect see the article quoted and also: "Justice Holmes and the Nature of Law," *Columbia Law Review*, Vol. 31, page 352, and "Positivism and the Limits of Legal Idealism," *Columbia Law Review*, Vol. 27, page 237. Also, *My Philosophy of Law* (cited above), page 31.

13. Thurman W. Arnold, *The Symbols of Government* (New Haven: Yale University Press—1935), pages 7, 32 ff., 49, 56, 59. The character of Mr. Arnold's philosophy is disclosed in the opening sentences of his book, where he says: "The principles of Washington's Farewell Address are still sources of wisdom when cures for social ills are sought. The methods of Washington's physician, however, are no longer studied." Some of the principles of Washington's address are basic principles of morality and religion. To imply, as Mr. Arnold does, that such principles should be as changeable as the methods of treating physical disease, is to furnish a good example of contemporary positivism which denies all absolutes and limits all knowledge to the tentative propositions of the experimental sciences. The trouble is that in so doing, positivism is left with no reliable basis for those elementary rights which are indispensable to the normal life of all free men.

14. *Law and Morals*, 2d Ed. (Chapel Hill: University of North Carolina Press—1926), page 13. The following words of Dean Pound are also significant: "On many other occasions I have spoken of the importance of received ideals as an element in law. There is no need of repeating it, nor need

man both in his private and his social conduct. In respect of his social conduct, its first principle is, *seek the common good,* or, the same thing analytically expressed, *do good to others, harm no one and render to each his own.*

Of course, these principles are far too general to serve as criteria for either moral or legal justice. The reason is that they constitute the most general principles of law. Actually, they prescribe the ends of justice; what is needed to make them effective is the means, because action follows upon a choice of means. The first of these means are precepts which are necessarily drawn from these first principles and which have been called the *jus gentium* or law of nations because they can be known to all men of normal conscience and are generally recognized throughout the world. Examples are: One may not kill, one may not steal—precepts which, it may be noted, were included in the old Judaic law. However, like the principles in which they are rooted, these precepts also are too general to serve as norms of conduct in specific cases.

The reason is that they constitute the means of justice in a general or universal sense; what is needed is a rule of application to bring such a precept to bear upon the concrete facts of a given case. For example, the precept declares that one may not kill. But may one kill in defense of his person? Or of his property? May one kill though the threatened injury be slight? Such questions indicate the need of a positive rule of law which defines unlawful homicide as distinguished from lawful killing and which specifies the punishment for an unlawful killing. The same necessity for positive laws is indicated in the field of property rights; and accordingly we have laws which prescribe the duties of man in particular classifications and under particular circumstances, laws governing carriers for hire and gratuitous carriers, laws governing the obligations of fiduciaries to their beneficiaries, and so on. These man-made rules are laws in the lawyer's sense and the judge's sense, the positive instrumentalities with which they deal.[16]

Structure of the Household of the Law

Here, then, is the structure of the household of the law, a three-story edifice of principles, precepts and rules. The significant point is that rules, to be valid, must be based upon these underlying precepts and principles, for if they are not they will sooner or later become the instruments of tyranny rather than of justice.

This doctrine has had a long and illustrious history. The basic concept is found in the writings of ancient times, and in one way or another it has been recognized ever since by philosophers and poets, statesmen and lawyers, kings and saints.

It is found in the literature of ancient Greece, where curiously enough it was confronted with the same scorn and abuse which it encounters today. This is illustrated in a conversation between Pericles and the Athenian youth Alcibiades, recorded by Xenophon. Alcibiades asked Pericles what law is. Pericles said that law was everything which the people, having assembled for that purpose, have enacted, prescribing what should be done and what should not be done. But if these enactments prescribe bad things, what then? Everything, answered Pericles, which the supreme power in a state has enacted, is called a law, even if prescribed by a tyrant. But if that is so, asked Alcibiades, what are force and lawlessness? When I was your age, answered Pericles, I was very acute at such disquisitions. Would that I had conversed with you, said Alcibiades, when you were most acute at discussing such topics.[17]

"The Higher Law" in Greek Philosophy

A similar discussion occurs in the Platonic dialogue *Minos.* The Sophist in the dialogue was maintaining the same proposition as Pericles. He argued that law is merely the things established by law. In this, however, he was opposed by Socrates, who answered, if I ask what is gold, you would not inquire, what kind of gold. For gold cannot differ from gold, so far as it is gold. Neither can law differ from law, in so far as they really are law. Law, therefore, cannot be merely the sum of existing rules, for some are good and some evil, but law cannot be evil. Only those decrees are law that are good and consonant to law in its true sense. Therefore, in the regulation of a city, while the right is law, the wrong is not, it is unlaw.[18]

This early championship of the higher law is found elsewhere in Greek thought. It was maintained by Plato's great pupil, Aristotle, who divided law into particular and universal, particular being the positive law of a community, and universal being "the law of nature." Such reasoning led Aristotle to the conclusion that "there really is, as everyone to some extent divines, a natural justice . . . that is binding on all men."[19] To Demosthenes the ulti-

(Continued on page 202)

one apologize before this audience for speaking of things so unfashionable as ideas and ideals. To economic determinism, to psychological realism, to skeptical realism and to phenomenalism, such things are futile illusions. It is true these fashionable modes of thought of the moment have ideas of their own. But they are ideas of give-up. They lead to political absolutism. Whether such absolutisms are fascist under the form of a kingdom or of a dictator-led republic, or communist under a dictator, or administrative-bureau-ruled under the form of a democracy does not greatly matter. In such regimes there is no place for law as distinguished from laws and administrative orders. There is no place for a taught tradition of ideals to which experience is molded by reason and reason is tempered by experience." *Jubilee Law Lectures,* Washington, D. C., 1939, page 6.

15. *The Spirit of Laws* (London: George Bell & Sons—1878), Vol. I, pages 118 ff.

16. In contrast to the principles and precepts of the natural law, which are immutable, these positive rules of law are changeable, except of course to the extent that they merely restate such principles or precepts. It is erroneous, therefore, to attack the natural law doctrine on the ground that it obstructs progress. Positive laws should change in order to bring the constant principles and precepts of the natural law properly to bear upon the changing circumstances of life and to keep pace with expanding enlightenment.

17. *Memorabilia* 1, 2, 40-46. I have followed a brief condensation of the dialogue contained in Professor Charles H. McIlwain's *The Growth of Political Thought in the West* (N. Y.: Macmillan Co.—1932), page 16.

18. *Minos,* cap. IX, page 317. This, too, is an abbreviated version, following Professor McIlwain, *op. cit.,* page 18.

19. *Rhetorica,* I, 13.

5

Nominations of Judges:

Association's Views To Be Given Weight

■ Ways and means of bringing about the appointment and confirmation, to federal judicial offices, of lawyers who are qualified by their experience on the bench or at the Bar, and who possess known qualities of independence, impartiality, and fidelity to justice and the law, are uppermost in the minds of many lawyers throughout the United States and in the deliberations and work of many Bar Associations. These discussions seem likely to come to the point of action at the meeting of the House of Delegates in Chicago on February 24-26, when the Association's new Committee on the Judiciary will submit its specific recommendations.

Meanwhile, the forthright statement made on January 5 by Chairman Alexander Wiley of the United States Senate Committee on the Judiciary has attracted Nationwide attention, because of his assurance that the considered recommendations of the American Bar Association and "other recognized and respected legal groups", will be given weight by his Committee, to which will be referred all nominations for judicial office. Because of its public importance and its plainness of speech in behalf of a truly representative, qualified and impartial judiciary, we publish Senator Wiley's statement in full, and also the judicial statistics supplied by Attorney General Tom C. Clark at Chairman Wiley's request, both being lively contributions to the current discussions.

ALEXANDER WILEY

■ That the views and recommendations of the American Bar Association and other "recognized and respected legal groups, in contrast to those of political officials", will hereafter be given weight by the United States Senate Committee on the Judiciary, is the assurance given on January 5 by Senator Alexander Wiley, of Wisconsin, the new Chairman of the Committee (32 A.B.A.J. 890). Chairman Wiley also indicated the intention of his Committee to scrutinize carefully all nominations for judicial office, which will be referred to that Committee.

After thanking his colleagues of the majority party in the Senate for the designation as Chairman of the Committee on the Judiciary, Senator Wiley's statement was as follows:

> I want to take this occasion to assure all of my fellow Senators, the legal profession, and the public generally of my determination to be worthy of the high responsibility which has been conferred upon me. I shall strive to carry out the chairmanship duties faithfully and in accordance with the Legislative Reorganization Act, Public Law 601 of the Seventy-ninth Congress.

I want to call attention to four of my aims in connection with the future work of the Senate Judiciary Committee:

(1) To Seek a Balance in the Federal Judiciary

The present political character of the membership of the federal bench is, according to my preliminary study, grossly lopsided on the side of Democratic Leftists. I shall strive to restore a balance so as to assure for the bench an adequate supply of able jurists (including a fair proportion of Republicans), all of whom will be of unimpeachable judicial standing and dedicated to our Constitutional system of

checks and balances. . . .

Appointments to the federal judiciary must not, however, be made a political football. This is what the Democrats did when the Republicans were last in power. I recall that all of the judicial nominations made by President Hoover to the second session of the Seventy-second Congress, between December 5, 1932, and March 4, 1933, were forestalled by threat of a Democratic filibuster. These included nominations to two Circuit Courts, one Customs Court, two United States district judges, one municipal judge, four United States Attorneys and one United States Marshal. Not one of these was confirmed!

(2) To Expedite Committee Business

In the past, at the end of Congressional sessions, Senate committees have found their calendars log-jammed with bills on which no action has been taken. This may be remedied in part by the effect of the Legislative Reorganization Act. However, I shall strive to clear the calendar of the Senate Judiciary Committee with all possible speed, but with appropriate consideration to each bill in accordance with its intrinsic importance.

I shall make a particular effort to secure speedy reports from the executive agencies on pending legislation. In the past, many agencies have failed to report on a bill for many, many months, thus forestalling action. The Judiciary Committee, I trust, will establish time limits within which each of the agencies must report on bills. If the agencies fail to report within those limits, the committee will, I hope, proceed to take action independently of any forthcoming agency report.

(3) Full Weight to Legal Groups' Opinions

In the past, the opinions of the American Bar Association and other recognized legal groups have not been accorded the weight and respect which are their just due. Instead, as I have indicated, political considerations have too often dominated the appointment of federal judges. So long as I am Chairman of the Judiciary Committee, full weight will be given to the recommendation of recognized and respected legal groups, in contrast to those of political officials. This means that in District of Columbia appointments, particularly, the District Bar Association's views will be carefully and sympathetically studied.

Chairman Wiley's statement further pledged support to efforts for the codification of federal laws, the lessening of the number of new laws, and the "killing" of "as many bad bills as possible" in Committee. He said:

> I shall make every effort for the codification of federal law to insure its simplicity and understandability to the layman, insofar as possible. Hand in hand with this aim is my goal of killing as many bad bills as possible that are introduced and referred to my committee. In the past, the Judiciary Committee, like every other committee of Congress, has seemingly been dominated by the obsession of passing more and more laws in the mistaken hope that primarily through legislation, the welfare of our people could be assured. On the contrary, it is my belief that legislation must be de-emphasized as a cure-all, and that every effort must be made to assure the self-reliance of the American people in accordance with their right and their ability to handle problems by themselves.

Letter to Attorney General Clark

Chairman Wiley also made public a letter which he had written to Attorney General Tom C. Clark, to ask for information as to judicial appointments, as follows:

> I am greatly desirous of obtaining information with reference to the subjects which are outlined herein. It occurred to me that specific details regarding these, in all likelihood, would be of ready access in the Department of Justice.
>
> Accordingly, I am addressing this letter to you, with the request that it be appropriately channeled for early attention and reply, as to the following subjects:
>
> 1. Total number of federal judges having life appointments.
>
> 2. Total number of present incumbent judges who have been appointed since 1932:
>
> (A) In the United States.
>
> (B) In the Territories.
>
> 3. Total number of appointments of Republicans to federal judgeships, if any, since 1932:
>
> (A) In the United States.
>
> (B) In the Territories.
>
> 4. (A) Total number of incumbent Republican judges promoted since 1933 to Federal Appeal Courts.
>
> (B) Total number of Democrats so promoted.
>
> 5. (A) Total number of federal judicial vacancies created by Act of Congress since March, 1933.
>
> (B) Which, if any, were filled by Republicans?

Statistics as to Judicial Appointments Since 1932

When he had received from Attorney General Clark on January 9 the statistics which he had requested, Chairman Wiley said that they showed only seventeen Republicans among the 231 federal judges appointed since 1932. He declared that the Courts had "an indefensible overrepresentation of members of the present minority party," and that public respect for the Courts had declined because of "boss-selected choices" for the bench.

He maintained that he did not suggest that judges should be appointed, or highly qualified lawyers excluded from appointment, because of their party affiliations, but declared that there was no such disparity or ratio as to the relative number of appointments showed, in the qualifications of members of "the present majority party" for judicial office, and certainly no such preponderance of qualifications among members of particular views in "the present minority party". He assured that a Court appointee will not be disqualified because he is a Democrat, but added that "a fair representation of Republicans must be achieved."

Declaring that judicial appointments must not be distributed as favors for political services, he added:

"There is an over-abundance of politicians on the bench who lack any substantial legal background or other appropriate qualifications."

Mr. Clark's summary showed that there were 276 active federal judges holding life appointments and thirty-two retired.

Incumbent judges appointed since 1932 include 192 in the United States Courts, twenty-five in the Territorial Courts, and fourteen in the lower Courts of the District of Columbia.

According to the *Associated Press*, Attorney General Clark reported that nine Republicans have been appointed to the United States Courts since 1932, six to the Territorial

Courts and two to the District of Columbia lower Courts. He listed five Republican judges appointed since 1933 to federal Appellate Courts. They were:

Harold H. Burton, appointed to the Supreme Court, September 22, 1945.

Harlan Fiske Stone, elevated to Chief Justice of the United States Supreme Court in 1941, who served until his death last year.

D. Lawrence Groner, appointed Chief Judge of the United States Court of Appeals for the District of Columbia. Judge Groner was appointed to the Court by President Hoover in 1931; he was appointed to be its Chief Judge in 1938.

William Clark, elevated to the Third Circuit Court of Appeals in 1938; resigned in 1942.

Robert P. Patterson, elevated to the Second Circuit Court in 1939; resigned in 1940.

The Attorney General's report said that fourteen incumbent Democratic judges had been promoted since 1933 to federal appellate Courts. He reported also to Chairman Wiley, as requested, that a total of sixty-two federal judicial vacancies had been created by Acts of Congress since March of 1933.

"Two Republicans were appointed to these posts," he added. "Leon R. Yankwich to the judgeship created in 1935 for the Southern District of California, and Nathan Cayton to the Municipal Court of Appeals for the District of Columbia, which was created in 1942."

Association's Committee on the Judiciary Meets

To organize its work for the present Association year, including cooperation with Chairman Wiley and the Senate Committee, and to begin the preparation of its report to the meeting of the House of Delegates on February 24, the Association's Committee on the Judiciary met in Washington, D. C., on January 15, which was after this issue of the JOURNAL had gone to press.

The members of this Committee appointed by President Carl B. Rix for the present Association year are:

John G. Buchanan, Chairman
Pittsburgh, Pennsylvania

J. N. Welch
Boston, Massachusetts

Jackson A. Dykman
Brooklyn, New York

Douglas McKay
Columbia, South Carolina

Francis H. Inge
Mobile, Alabama

Jay P. Taggart
Cleveland, Ohio

Richard Bentley
Chicago, Illinois

Forrest C. Donnell
St. Louis, Missouri

Loyd Wright
Los Angeles, California

A. W. Trice
Ada, Oklahoma

Henry I. Quinn
Washington, D. C.

Especially in view of Senator Wiley's statement, and the actions taken by various State and local Bar Associations, it is expected that the report and recommendations of the above Committee will be among the principal subjects discussed and voted on by the House of Delegates in Chicago on February 24-26.

THE TRUE LIBERALISM OF LIBERTY

"The spirit of liberty is the spirit which is not too sure that it is right. The spirit of liberty is the spirit which seeks to understand the minds of other men and women. The spirit of liberty is the spirit which weighs their interests alongside its own without bias. The spirit of liberty remembers that not even a sparrow falls to earth unheeded. The spirit of liberty is the spirit of Him who, near 2,000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest."

—JUDGE LEARNED HAND

6

Women as Jurors:

The Present Status of Women as to Jury Service

by **Marguerite J. Fisher** • Assistant Professor, Maxwell Graduate School, Syracuse University

■ The Supreme Court's decision on December 9 in *Ballard* v. *United States* declared significant doctrine as to exclusions from jury service and changes the picture as to the inclusion of women in jury panels in many States. In 1925 the JOURNAL published an article on "Women and Jury Service", by Miss Elizabeth M. Sheridan (11 A.B.A.J. 792). The present article brings the subject down to date, including the *Ballard* decision. Trial lawyers will be interested in reading this report, along with the Court's opinion. Dr. Marquerite J. Fisher is Assistant Professor of Political Science in the Maxwell Graduate School of Citizenship of Public Affairs, at Syracuse University. She was graduated from Smith College and did graduate work at Columbia and Syracuse. She is President of the Syracuse Federation of Business and Professional Women, and was President of the Syracuse League of Women Voters. She has written extensively for publication, on citizenship subjects. In private life she is Mrs. Thomas J. Fisher.

■ It is commonly maintained that one of the basic responsibilities of citizenship is the duty to serve on juries. The right to trial by a jury of one's peers has for many centuries been considered one of the bulwarks of individual liberty in both England and America.

In conformity with these assumptions, in Great Britain today jury service has been made compulsory for both men and women. In contrast, in sixteen of the American States, women are still denied the right to serve on juries. The denial of this right has its origin in the English common law. Blackstone, the famous Eighteenth Century commentator on the common law of England, listed the "defect of sex" along with alien birth, conviction for an infamous crime, outlawry and excommunication, as factors which disqualified a juror.[1] The status of women under the common law, especially as derived from Blackstone, became one of the principal targets of attack by the feminist movement of the Nineteenth Century.

The first instance of a woman serving as juror in American history took place in 1870 in the territory of Wyoming. It reflected the influence of the equalitarian attitudes of the frontier environment.[2] In 1869 the territorial legislature had passed an act granting the suffrage to women. On the assumption that the right to vote carried with it the right to jury service, the following year women were called both as grand and petty jurors in the territorial District Court. With appropriate solemnity the judge addressed the women members of the first mixed jury in these words: "You shall not be driven by the sneers, jeers and insults of a laughing crowd from the temple of justice, as your sisters have been driven from some of the medical colleges of the land." The news of this mixed jury spread throughout the world and met with high approval in one rather unexpected quarter. King William of Prussia sent a congratulatory telegram to President Grant, complimenting him on "this evidence of progress, enlightenment and civil liberty in America."

Effects of the Constitutional Amendments

The proponents of woman juror service encountered a severe setback in 1872 in the United States Supreme Court's decision in the case of *Strauder* v. *West Virginia*.[3] In this case the Court held that a State could not bar colored men from jury

1. See 3 *Blackstone Comm.* 362.
2. See the article by G. R. Hebard, "The First Woman Jury," in the *Journal of American History*, pages 1293-1341; Vol. 7, No. 4, 1913.
3. *Strauder* v. *West Virginia*, 100 U. S. 303, 25 L. ed. 664.

service, because such discrimination would be "practically a brand upon them affixed by the law, an assertion of their inferiority," thus depriving them of equal protection of the laws guaranteed by the Fourteenth Amendment. The Court was unwilling to extend this constitutional protection to women, however, declaring that certain restrictions might be placed by the State on jury service, such as "limiting it to males".

Prior to the adoption of the Women's Suffrage Amendment in 1920, several western States passed legislation making women eligible for jury service. After 1920 the question arose: Did the right to vote, conferred by the Nineteenth Amendment, carry with it eligibility for jury service? In ten States the courts held in the affirmative. In other States the courts denied this assumption, holding that jury service was a duty required of citizens and not a necessary incident of the right of suffrage, nor a privilege granted to all citizens under the Fourteenth Amendment.[4] In such States it has been necessary to adopt special statutes or amendments to the State constitutions in order to establish jury service for women.

States Which Still Exclude Women As Jurors

The sixteen States which still bar women from jury service are: Alabama, Florida, Georgia, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wyoming.

All the sixteen States, with the exception of Massachusetts, refer specifically to "men" or "males" in their statutes dealing with juror service. In Massachusetts, the law provides that a person qualified to vote for representatives of the General Court shall be liable to service as a juror.[5] Contending that women were eligible as jurors under this law, the National Women's Party and other women's organizations initiated a test case in the courts. In 1931 the Supreme Court of Massachusetts decided that women were still ineligible as jurors, declaring that: "It is unthinkable that those who first framed and selected the words for the statute . . . had any design that it should ever include women within its scope . . . It is equally inconceivable that those who from time to time had re-enacted that statute had any such designs. When they used the word 'person' in connection with those qualified to vote for members of the more numerous branch of the General Court, no one contemplated the possibility of women becoming so qualified."[6]

Provisions in States Which Permit Women to Serve

Of the thirty-two States which admit women to jury service, seventeen of these States provide for compulsory service, making women eligible on the same terms as men, and allowing them the same exemption.[7] In the remaining fifteen States and in the District of Columbia, juror service is optional for women.[8] Typical of such State legislation is that of New York, which provides that women are eligible for service under the same qualifications that apply to men. But the woman called for jury service, "though fully qualified, may claim exemption from service solely on the ground of sex."[9] Similarly, the Minnesota law, while stating that women are eligible for jury service, adds that "upon her request and in the discretion of the court, any woman drawn for jury service may be excused."[10]

Women Jurors in Federal Courts

In the federal courts women are eligible for jury duty only in those States which permit women to serve as jurors in State courts, since the Federal Judicial Code provides that qualifications for jurors in federal courts shall be the same as those established for jurors in the highest court of the State where the federal tribunal convenes. In 1941 Chief Justice Stone, at the request of the Judicial Conference of Circuit Judges, appointed a committee of federal judges to study the question of a uniform or standardized system of qualifications for jurors in the federal courts.

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This committee brought in its report in 1942, recommending the passage of a federal law establishing uniform national standards for the selection of jurors in all federal courts. The proposed federal law recommended by the committee would make women eligible for jury service in States where they are now disqualified, and woman juror service would be made compulsory in those States where it is now optional. The committee declared in emphatic terms that "women as a group are capable of acting as jurors and should, irrespecive of State law, be called for service in the federal courts."[11] The committee felt that the need for women jurors had been intensified by the war, which was

4. See *McKinney* v. *State*, 3 Wyo. 719, 30 Pac. 293; *People* v. *Lansen*, 34 Cal. App. 336, 167 Pac. 406; *People* v. *Barltz*, 212 Mich. 580, 180 N. W. 423.

5. Ch. 234, sec. 1.

6. *Commonwealth* v. *Welosky*, 276 Mass. 398, 177 N. E. 656. (1931).

7. These seventeen States are: California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania and Vermont.

8. These fifteen States are: Arizona, Arkansas, Delaware, Idaho, Kansas, Louisiana, Minnesota, Missouri, Nevada, New York, North Dakota, Rhode Island, Utah, Washington and Wisconsin.

9. Laws of 1937, Ch. 513.

10. Sec. 10610.

11. *New York Times*, December 29, 1942.

drawing eligible male jurors into the Armed Forces and into war industries, thus making them unavailable for jury duty.

Proposed Federal Legislation

A bill to carry out the committee's recommendations was introduced in the Seventy-ninth Congress in 1945.[12] Hearings on the bill were held by the House Committee on the Judiciary in June, 1945,[13] but no action was taken to report the measure out of subcommittee. Statements of committee members would seem to indicate some opposition to the proposed mandatory jury service for women.

Representatives from some of the sixteen States which still bar women from juries have expressed their willingness to accept optional, but not mandatory, woman juror service. In many of the seventeen States, patient campaigns for woman juror laws are carried on from year to year as the legislatures meet. Many of the States which bar women from juries also voted against the Nineteenth Amendment when it was submitted to the States for ratification.

Recent Decision of the United States Supreme Court

An important decision involving the right of women to serve on juries was handed down by the United States Supreme Court on December 9, 1946. In the case of *Edna Ballard and Donald Ballard* v. *U. S.*, the defendants were indicted, tried, and found guilty of fraudulent use of the mails by a federal District Court in California. Women had been intentionally and systematically excluded from the panels from which both the grand jury and the trial jury were drawn. Under California law, women were eligible for jury service. Thus under federal law they would have been eligible as jurors in the federal courts in the State. The Supreme Court held in this case that the indictment should be dismissed, on the ground that such systematic exclusion of women, like the exclusion of a racial group (*Smith* v. *Texas*, 311 U. S. 128), or of an economic or social class, (*Thiel* v. *Southern Pacific Company*, 328 U. S. 136), deprived the jury system of the broad base it was designed by Congress to have. The Court rejected the contention that an all-male jury, if drawn from various groups in the community, would be sufficiently representative. "The truth is," declared the Court, "that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence, one on the other, is among the imponderables . . . a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." Thus, according to this decision, in those States which provide for woman juror service in State Courts, women may not be systematically or intentionally excluded from grand or petty jury service in the federal Courts.

12. Proposal to revise Section 275 of the Judicial Code (U. S. C., Title 28, sec. 411), contained in S. 1245 and H. R. 3379.

13. Hearings before the Committee on the Judiciary, House of Representatives, 79th Cong., 1st sess., on H. R. 3379; June 12 and 13, 1945.

A German View of "War Guilt" in 1870

■ From a faded copy of the *Supplement to Harper's Weekly* for December 3, 1870, sent to us by George E. Pike, of Waterloo, Iowa, a member of our Association since 1939, the JOURNAL takes the following "startling paragraph", reprinted from the semi-official *North German Correspondent*, concerning "individual guilt" in a war in which Germany was victorious:

"A DAY OF RECKONING COMING

"The necessity and justice of making the authors of a war, and not, as hitherto, merely their subordinates and tools, responsible for their own acts before the world, have suggested the idea in governmental circles of stipulating as a condition of peace between France and Germany that the intellectual originators and instigators of the present war shall not escape with impunity. Among the responsible parties are included the entire executive which devised the invasion of Germany; the statesmen who approved it; the ministers by whom it was recommended; the orators who labored for, demanded, and welcomed it; the journalists whose constant text was war, and who discounted the triumphs of the coming campaign. The verdict of 'Guilty' or 'Not guilty,' and the penalty to be inflicted, would be left to a jury composed of citizens of neutral states, supposing those states to lend the plan their concurrence; or, in case of their refusal, the jurymen might be taken from the two belligerent nations themselves. The institution of an international jury for the punishment of peace-breakers is regarded in governmental circles as likely to furnish no unsatisfactory guarantee for the future peace of Europe."

7

Labor Relations Law:

Association's Section Plans Constructive Work

■ With questions of labor relations law and policy uppermost in the public's mind, the Association's new Section has organized on a representative basis, with attorneys customarily representing labor organizations and employers, as well as spokesmen for the public point of view, taking an active part in its planning and work. For the first time in the Association's history, lawyers of National prominence as counsel for AF of L and CIO organizations are active in important phases of the Association's work. The objective is stated to be to seek out the possible areas of agreement rather than division, and thereby to evolve constructive recommendations. All members of the Association who are concerned with labor relations law or would like to help in solving its difficult problems are urged to join this Section, attend and take part in its meetings, express and vote their views, and receive its publications.

■ The Association's new Section of Labor Relations Law, initiated in 1945 and organized in 1946, has developed plans for its first year of work, looking forward to the 1947 Annual Meeting in Cleveland. The Section now has members in every State, the District of Columbia, and Hawaii; and its roster is steadily growing. More than 200 lawyers attended its first sessions in Atlantic City on October 29.

The organizational work for the new Section was done largely by Clif Langsdale, of Kansas City, Missouri, General Counsel for many National, State, and local labor organizations, and Colonel John M. Niehaus, of Chicago, Illinois, in charge of labor relations across the Middle West for the Signal Corps during the war. Langsdale had been the 1945 Chairman of the Association's Standing Committee on Labor Employment and Social Security. They were chosen as the first Chairman and Vice Chairman respectively, of the Section.

The basic purpose has been to bring into the Section and into its governing Council the lawyers who customarily represent differing and opposed angles of viewpoint and interest, throughout the country. Accordingly, its Council (See our January issue page 75) contains Joseph A. Padway, General Counsel for the AF of L, and Roy H. Glover, of Butte, Montana, counsel for Anaconda Copper; Lee Pressman, General Counsel for the CIO, and Donald R. Richberg, counsel for employers and public groups; Robert D. Morgan, attorney for mid-west employers, of Peoria, Illinois, and M. Louise Rutherford, Assistant Attorney General of Pennsylvania; Clarence Mulholland, of Toledo, Ohio, General Counsel for Railway Labor Executive Association, and Sylvester C. Smith, Jr., of New Jersey.

Lee Pressman, of Washington, D. C., has been appointed by the Counsel to represent the Section in the House of Delegates. Professor Alexander Hamilton Frey, of the University of Pennsylvania, has been elected Secretary of the Section.

These, and other lawyers known for their interest in such problems, including Charles P. Taft II, of Cincinnati; Albert Smith Faught, of Philadelphia; President Carl B. Rix and Past President Willis Smith, David A. Simmons, and George Maurice Morris attended the Section's first meetings.

The dominant note which was reported as emerging from the discussion in Atlantic City was that, at the present stage, every reasonable effort should be made by the members of the Section's Committees, and of the Council itself, in keeping with the Association's long tradition of acting only in the public interest, to achieve virtual unanimity with respect to any recommended action, and that primary or selfish interests of clients should be put aside in dealing with the complex ramifications within the field of labor relations law.

The Section's Committees and Their Scope

The Section's Council held its first meeting at Washington, D. C. on December 3 and 4, 1946, and unanimously agreed upon the creation of various Committees. The names of the Committees and their scope follows:

1. *Committee on improving the process of collective bargaining:* This Committee is to concern itself with

improvement of the process of negotiating union-employer contracts, and extensions and re-negotiations thereof, with particular emphasis upon the problem of minimizing the occurrence of deadlocks between the parties.

2. *Committee on improving the administration of union-employer contracts:* This Committee is to concern itself with the performance of an existing union-employer contract, with special concern toward minimizing the occurrence of a stalemate between the various parties with reference to its interpretation, so as to bring about a better understanding and to emphasize the necessity of both parties living up to the full meaning of all of the terms of the contract.

3. *Committee on labor relations of governmental employees, federal, state and local:* It is recognized that to some extent the scope of this Committee may overlap that of the preceding two Committees, but the Council concluded that the status of governmental employees is sufficiently different from that of other employees to justify separate consideration of the adjustment of their labor relations. By "local" government the Council comprehends any political subdivision less than that of a State, including school districts and even quasi-governmental employees.

4. *Committee on federal legislation:* This is regarded as perhaps the most important Committee created; it will study all new bills introduced on labor matters, follow such legislation as is proposed, and not only report upon it but make recommendations as to the various proposals. Ultimately this Committee may recommend to the Congress, through the House of Delegates, changes which are considered sound and constructive in the labor laws of the Nation.

5. *Committee on State legislation:* This Committee will function in a similar manner as the Committee on federal legislation, carefully following the introduction of all new labor legislation in the several States as well as study the various State laws which are in force on this subject.

6. *Committee on wage-and-hour legislation (federal and State):* Because of the importance of this special field, a Committee will devote itself to this particular subject, which will also include such matters as annual wage plans and other kindred topics.

7. *Committee on publications:* This Committee will serve as an editorial reference bureau for the Section and will follow all decisions of Courts, boards and bureaus on labor law subjects. This Committee plans to render a monthly service to the appropriate department of the JOURNAL or other Association publications, furnishing a digest of recent decisions on labor law topics.

8. *Membership Committee.*

The Chairman and members of these Committees have been appointed by the Chairman and Vice-Chairman of the Section, acting with the advice of the Council. Consideration was given to certain matters such as arbitration, limitations of the right to strike, jurisdictional disputes, etc., on which separate Committees might have been established. The Council decided that it is best to treat of these and kindred matters as an incident of the work of one or more of the Committees above indicated.

Large Membership in the Section Is Desired

The by-laws of the Section provide that any member of the American Bar Association, upon payment to the Secretary *of the Association* of the annual dues of three dollars for Section membership, shall be enrolled as a member of the Section. The members of the Council are appreciative of the interest and approval with which the lawyers have greeted the creation of the Section. It is not desired or desirable that this Section be made up only or principally of practitioners who specialize in labor law. All lawyers who are interested in the subject, especially from the public point of view, are cordially invited to join and to participate actively in the work of the Section. Particularly is it hoped that teachers of labor law in the various law schools and universities, arbitrators, and lawyers serving the public interest, will welcome the opportunity of coming into this Section and joining in its constructive work.

The Guaranty of the Great Charter

"No freeman shall be taken, or imprisoned, or outlawed, or banished or anyways destroyed; nor will we pass upon him except by lawful judgment of his equals." —From The Magna Carta

8

The Judicial Conference:

Chief Justice Vinson Reports the Proceedings

■ The report of the first Judicial Conference presided over by Chief Justice Fred M. Vinson has been issued by him. It contains many matters of interest to the profession and the public throughout the United States. With it should be read the report rendered to the Conference by Henry P. Chandler, Director of the Administrative Office of the Courts of the United States, which was published in our November issue (pages 745-748). Although our limitations of space prevent our publishing Chief Justice Vinson's report in full, the summary gives information as to its salient points. Improvement in the mechanics of administering justice is manifest throughout the federal system.

■ The 1946 Judicial Conference, convened by the Chief Justice pursuant to 28 U.S.C. 218, met in Washington on October 1 and continued in session during four days. The following Circuit Judges were present:

The Chief Justice, Presiding

District of Columbia: Chief Justice D. Lawrence Groner

First Circuit: Senior Circuit Judge Calvert Magruder

Second Circuit: Senior Circuit Judge Learned Hand

Third Circuit: Senior Circuit Judge John Biggs, Jr.

Fourth Circuit: Circuit Judge Morris A. Soper

Fifth Circuit: Senior Circuit Judge Samuel H. Sibley

Sixth Circuit: Senior Circuit Judge Xenophon Hicks

Seventh Circuit: Circuit Judge J. Earl Major

Eighth Circuit: Senior Circuit Judge Kimbrough Stone

Ninth Circuit: Senior Circuit Judge Francis A. Garrecht

Tenth Circuit: Senior Circuit Judge Orie L. Phillips

Senior Circuit Judge John J. Parker of the Fourth Circuit was unable to attend the Conference except on the third and fourth days. Circuit Judge Soper attended throughout the sessions.

Senior Circuit Judge Evan A. Evans of the Seventh Circuit was unable to attend because of illness. Circuit Judge Major attended in his place.

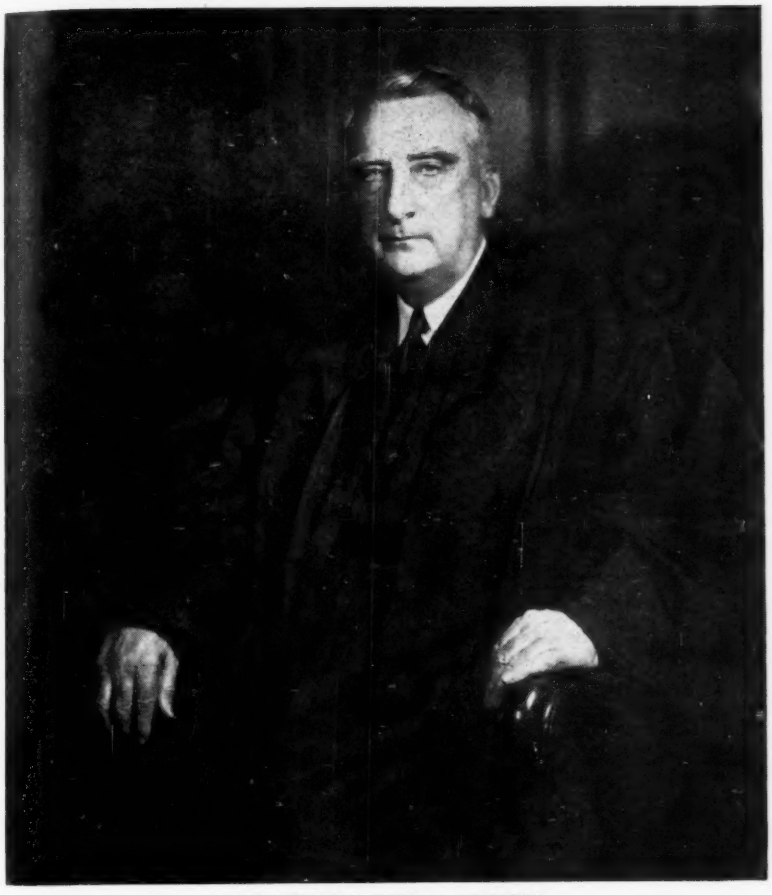
Senator Patrick A. McCarran, Chairman of the Senate Committee on the Judiciary, was unable to attend, because of official business which necessitated his absence from Washington. Representative Hatton W. Sumners, retiring Chairman of the Committee on the Judiciary in the House of Representatives, addressed the Conference on its fourth day. The Attorney General of the United States addressed the Conference on its fourth day.

Henry P. Chandler, Director; Elmore Whitehurst, Assistant Director; Will Shafroth, Chief, and Leland L. Tolman, Assistant Chief of the Division of Procedural Studies and Statistics; Edwin L. Covey, Chief of the Bankruptcy Division; and Richard A. Chappell, Chief of the Probation Division, all of the Administrative Office of the United States Courts, attended the Conference and aided in its deliberations.

On invitation of the Conference, the following federal Court judges were present at various times and participated in Conference discussion: Harold M. Stephens, Associate Justice of the United States Court of Appeals for the District of Columbia; District Judges James Alger Fee, John C. Knox, Paul J. McCormick and James W. Morris.

Statement by the Attorney General

Chief Justice Vinson's summary of the matters presented to the Conference by Attorney General Tom C. Clark will interest members of the Bar. In discussing various matters of importance and interest to the federal judiciary as well as to the profession and the public, the Attorney General reviewed the progress made during the past year with respect to legislation giving particular emphasis to the Administrative Procedure Act, and to Title IV of the Legislative Reorganization Act of 1946, known as the Federal Tort Claims Act. He stated that while this would involve an increase in volume in the work of the Courts, the satisfaction of affording a more adequate remedy to affected persons will more than compensate for the additional burden.



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The Attorney General said that for the first time in many years, there were no vacancies then existing in any of the Courts comprising the federal judiciary. He assured the Conference that efforts will be continued to have vacancies filled promptly.

A summarization by the Attorney General of the experiences gained under the new Federal Rules of Criminal Procedure was reported as indicating very favorable reaction to the Rules from the Bar, the Department of Justice, and the Courts. He commended the judiciary upon the genuine endeavor it had evidenced to carry out the general intent of the Rules: i.e., simplicity of procedure, fairness in administration, and the elimination of unjustifiable expense and delay. A few instances in which the experiences of the Department reflected difficulty in administration were pointed to, and it was stated that the necessary steps to secure the proper amendments to remove these difficulties are being taken.

The Attorney General commented upon the desirability of securing the enactment of legislation heretofore approved by the Conference and supported by the Department, which had not been acted upon by Congress up to the present. Specific mention was made of the federal jury bills providing for uniform standards of qualification and uniform methods of selecting jurors, improvement in the provisions for jury commissions, and increase in the present remuneration for the subsistence and expenses of jurors while attending trials: the Youth Offenders Bill: the Public Defenders Bill; the Habeas Corpus Procedural and Jurisdictional Bills: and the bills modifying present procedures respecting the review of orders of certain administrative agencies. He stated that the Department is in full accord with the views of the Conference respecting each of these proposals, and that it will render every possible assistance in securing their enactment during the incoming Congress.

The Problems of Juvenile Delinquency

In closing, the Attorney General called attention to juvenile delinquency and the seriousness of the problems which it presents today. The Department has, for the past several years, given it the closest scrutiny, and feels that some progress toward a solution has been made. He referred to the so-called "Brooklyn Plan," and told of several interesting and successful instances of its operation. Under this plan, the juvenile offender, if he gives promise of being amenable to correction, is placed under supervision directed by the United States Attorney, and prosecution is deferred and later dispensed with if the offender makes a satisfactory record. In this process, friendly persons and agencies are drawn upon to the fullest extent, for assistance and counsel to the juvenile.

Some Courts have so interested themselves in this plan that they maintain a standing list of persons who are willing to accept these juveniles; religious groups, fraternal organizations, and civic bodies have evidenced a great interest in sponsoring the plan and assisting the Courts in their placement problems. The Department believes that much more can be accomplished through such cooperative measures. The Attorney General asked that the Conference authorize the appointment of a committee to consider the problem, in the hope that there may be devised, not only a workable plan, but a plan which will afford material opportunities for unfortunate youngsters.

Director Chandler of the Administrative Office submitted to the Conference his comprehensive annual report for the year ended June 30, 1946, which was summarized and

commented on in 32 A.B.A.J. 745. Included with it was Will Shafroth's report as Chief of the Division of Procedural Studies and Statistics. The Conference approved the Director's report and authorized him to include additional statistical information, not then available, in the printed edition of the report.

The Creation of Additional Judgeships

After considering the report of the Director of the Administrative Office and the statements of the several Circuit Judges respecting the work of the Courts in their particular circuits, the Conference renewed the recommendations which it had heretofore made; the creation of additional judgeships in the Southern District of New York and the District of New Jersey; also, that the last additional district judgeship created for the Eastern and Western Districts of Missouri be made permanent.[1]

In addition, the Conference recommended that provisions be made for the creation of the following additional judgeships:

> Circuit Courts of Appeals: One additional judge in the Seventh Judicial Circuit.
>
> District Courts: An additonal judge for the Northern District of California, and one for the Western District of Pennsylvania (the latter on a temporary basis, with provision that the first vacancy occurring within the District shall not be filled).

The proposal to create a new federal judicial district in California was disapproved.

Improvements as to Court Reporting

The Conference devoted considerable time to improving the efficiency of reporting, on the basis of the report and recommendations of its Committee on the Court Reporting System. To correct inequities and to provide, in certain instances, more efficient operating methods, it was ordered that numerous changes in the basic salaries, description of positions, and operating arrangements be made as to the Court reporters, to become effective in the various districts if and when the monies necessary to defray the expense incident thereto are appropriated by the Congress.

The Director of the Administrative Office was instructed to make every effort to secure promptly appropriation of monies needed to effectuate the foregoing changes.

Additional Permanent Reporters Provided

For the purpose of providing adequate Court reporting service for incumbents of recently created judgeships, the Conference approved and authorized the appointment of additional permanent reporters, in indicated districts.

The description of the Court reporting position in the District of the Canal Zone was ordered changed so that the reporter shall also act as secretary to the judge.

Criticisms as to Qualifications of Reporters

The Committee informed the Conference that it had been advised of certain criticisms respecting the qualifications of some of the reporters appointed under the recent Act, and that, because of this, a review of the qualifications of nearly all the present reporters in the federal Courts was had and the Committee is "satisfied that almost uniformly the federal Court reporters are of a high order of reporting ability."

The Conference affirmed the necessity of compliance in all cases with the standard of proficiency formulated by it in 1944,[2] pursuant to the provision of the Court Reporting Act (28 U.S.C. Supp. V, 9a), namely:

> That persons appointed as Court reporters of the United States District Courts shall be capable of reporting accurately verbatim by shorthand or mechanical means, proceedings before the Court at a rate of 200 words a minute, and furnishing a correct typewritten transcription of their notes with such promptitude as may be requisite. They shall demonstrate familiarity with the terminology used in the Courts, and shall be persons of unquestionable probity.

The Conference renewed its previous recommendations that, where applicants for appointment are not known to the Court to be of proved competence or do not have certificates of proficiency from State authorities or associations whose certificates are based on merit and generally recognized, the Court appoint a committee composed of members of the Bar, or Court reporters, or both, to conduct an appropriate examination. The Conference did not deem it advisable to establish a mandatory plan for examinations but urged the District Courts to exercise care in selecting for Court reporters fully qualified persons.

Definition of "A Page of Transcript"

The definition of "a page of transcript"[3] was amended to read as follows:

> A page shall consist of 25 lines written on paper 8½ by 11 inches in size, prepared for binding on the left side, with 1¾ inch margin on the left side and ⅜ inch margin on the right side. Typing shall be 10 letters to the inch.

In appeal cases *in forma pauperis* in which the transcript is furnished at government expense, the Director of the Administrative Office was instructed to authorize payment for as many carbons as are required to perfect the appeal by Rules of Court; but, when such service will require substantial additional expense, the Director may report the facts to the Senior Circuit Judge, so that consideration may be given to suspension of the Rule.

The Conference recognized the need for the appointment of temporary reporters in some instances when the regular reporters are unable to provide all the reporting service which is requisite for the proper functioning of the Courts; but it urged that, in the interest of economy, the Courts arrange as far as possible to have the proceedings before them reported by the regular reporters, so that the appointment and expense of temporary reporters may be held to a minimum.

1. Conference Report for 1945, page 7.
2. Conference Report (September, 1944), page 13.
3. Conference Report (September 1944): Appendix, page 1.

New Rates for Transcripts Prescribed

The following new transcript rates, effective as of November 1, 1946, were authorized and approved by the Conference:

District	Rate	
	Original	Copies
Second Circuit:		
New York:		
Northern	$0.40	$0.15
Western	.40	.15
Fifth Circuit: Louisiana, Western	.40	.15
Sixth Circuit: Kentucky, Eastern	.40	.15
Seventh Circuit:		
Illinois, Northern	.45	.20
Indiana, Northern	.45	.20
Wisconsin:		
Eastern	.35	.15
Western	.35	.15
Ninth Circuit:		
California:		
Northern	.45	.20
Southern	.45	.20
Oregon	.45	.20
Washington, Western	.45	.20
Tenth Circuit: Colorado	.45	.20

Change to a Permissive System Is Disapproved

The Committee advised the Conference that in the proposed revision of Title 28 of the United States Code entitled "Judicial Code and Judiciary," as set forth in H. R. 7124, 79th Congress, the House of Representatives Committee on Revision of the Laws of the House of Representatives has incorporated as Section 753 of the bill the major part of the Act of January 20, 1944 (the Court Reporter Act) and, in so doing, has changed the present mandatory provision of the law under which each District Court is required to appoint one or more reporters to a permissive provision under which the Courts *may* make such appointments.

It was the sense of the Conference that this change was one of substance and directly contrary to the theory of the Court Reporter Act that in each District Court there should be always available at least a minimum of official reporting service.

The Conference recommended that the mandatory provisions of the present law should be retained in any revision thereof, and authorized its Committee on the Codification and Revision of the Criminal and Judicial Codes and its Committee on the Court Reporting System to inform the Committee on the Revision of the Laws of its attitude and recommendations with respect to the change it has proposed.

The Director was authorized to consider a revision of the forms of periodic reports by the reporters of their business, so as to make them as simple as possible, consistently with furnishing the needed information, to confer on the subject with representative reporters, and to report his recommendations to the Committee on the Court Reporting System. He was also authorized to take the same course in reference to the forms of records of their operations to be kept by the reporters.

The following resolution in respect of office facilities for Court reporters was adopted by the Conference:

> RESOLVED, That the Judicial Conference considers it very desirable for the Court reporters for the District Courts to have quarters in the federal buildings in which the Courts are located, and recommends that wherever possible provision of this nature be made.

The Director of the Administrative Office was instructed to confer with the custodians of the various federal Court buildings, in an effort to carry out the wishes of the Conference in connection with the furnishing of office space for Court reporters.

The Conference ordered the Committee on the Court Reporting System continued, with the request that it pursue its studies, make an examination of each District in respect to reporters' salaries and transcript rates, and submit a further report and recommendations as promptly as possible.

Efforts for Economy in Expenses

The estimates of expenditures and appropriations necessary for the maintenance of the United States Courts and the Administrative Office of the United States Courts for the fiscal year 1948 were ordered approved as submitted. The Director of the Administrative Office, with the approval of the Chief Justice, was authorized to make any adjustments necessitated by the recently enacted Referees' Salary Act or by the Conference action with respect to the Court Reporting System. The Conference also approved the estimates for deficiency appropriations for the fiscal year 1947.

The Director referred to the need that savings be effectuated wherever possible and called attention to the admonitions of the Appropriations Committee respecting economies in operation. The Conference respectfully referred the members of the judiciary to the statement by the Director, under the topical heading "Economy in the Administration of the Courts", as Item VIII of his annual report for 1946, and urged that they continue to cooperate with the Director in his efforts to provide the Courts with efficient and economical methods of operation.

Improvements in Bankruptcy Administration

The Committee on Bankruptcy Administration reported that the Administrative Office, through Mr. Edwin L. Covey, Chief of the Bankruptcy Division, was engaged in the survey and plan for a reorganization of the system of Referees in Bankruptcy, provided for by the recently enacted salary bill for Referees (Public Law 464 of the 79th Congress, approved June 28, 1946); that in this connection Mr. Covey and his staff were conferring with the District Judges and other interested persons in the various districts, in order to arrive at a plan as satisfactory as possible to all concerned, and were keeping the Committee informed of their work; that the Committee considered that good progress was being made and expected that a plan for the determination of the number and salaries of Referees under the new Act will be ready for consideration by the Conference at a special meeting in April of 1947; and that according to this schedule, operation under the new Act will begin on July 1, 1947.

The Conference reaffirmed its previous approval of the proposed amendments to Section 57j, Section 64a (1), and Section 116 of the Bank-

(Continued on page 204)

9

International Law Organizations:

"What Goes On" and What Do They Offer?

■ Paraphrasing a famous remark about books, a valued member of our Association declared: "Of the making of Bar Associations there is no end." His remark was directed to the international sphere; he suggested that many American lawyers would like to know the nature and purposes of the multiplying organizations, which of them are federations and which admit individual members, what they offer to members, etc. We have had more than a few inquiries along that line. So we have brought together, from various sources, a brief summary of the present status. It is all a part of the picture of the broadening, deepening interest of American lawyers in international law and world problems.

■ Heightened by the American lawyer's confidence that "justice under law" is the essential ingredient for peace as well as order, his increasing awareness of the potentialities of the organized Bar has attracted his attention to international organizations concerned with the law of Nations and international organizations of members of the profession of law. The idea is not new but the emphasis is recent. Lack of information and some confusion, respecting current projects in the field appear to warrant a brief resumé, chiefly from the standpoint of our own Association, as to the background of such enterprises and what they now offer. Our readers may be interested in "a look around" at a developing field of cooperation in the legal profession.

Beginnings of International Organization of Lawyers

At least as early as 1896, the American Bar Association gave formal recognition to a kinship of interest with lawyers of foreign lands. In that year Lord Russel of Killowen, Lord Chief Justice of England, delivered the historic Annual Address to our Association. Mr. Montague Crackenthorpe "of the English Bar" read a paper on "The Uses of Legal History", at the same meeting. From this beginning, the practice of inviting distinguished members of the bench and Bar of other countries to address our Association at its Annual Meetings has grown. Many lawyers from many lands have by their presence and by their thoughts formally and informally expressed, stimulated our expanding consciousness that the members of the profession all over the world have interests in common.[1] In many ways this practice achieved its most representative fruition at the 1946 Annual Meeting at Atlantic City, where distinguished lawyers from many lands were our guests.[2]

A community of interests first becomes apparent among the men who follow the same system of law and who speak the same language.

Relations of our Association with the Canadian and the English Bars illustrate this maxim. The meeting of our Association in Montreal, Canada, in 1913, gave foundation for friendship between and among the lawyers of Canada and the United States upon which an enduring structure has been erected. That gathering helped stimulate the creation of the Canadian Bar Association; that meeting began the exchange, at the annual gatherings of the respective Associations of representative speakers. This delightful custom and the resulting understandings made easily possible the team-work and the joint proposals of the two Associations which were so largely incorporated in the Charter of The United Nations at San Francisco.

The many great English jurists who have addressed our Association over the years appear to have been largely responsible for the invitation to the members of the Association to go to London in 1924 and be the guests of the English judges, barristers and solicitors.[3] That invitation was followed by similar bids from the members of the profession in Ireland, Scotland and France. The warmth and splendor of the welcome and the keenness of the enjoyment of the welcomed, ("two thousand strong" under the leadership of President Charles Evans Hughes)[4], gave

1. 60 A.B.A.Rep. (1935) pages 712-18.
2. 32 A.B.A.J. 853.
3. 48 A.B.A.Rep. (1923) pages 106-7. The Canadian bench and Bar became co-hosts. See 49 A.B.A.Rep. (1924) page 5.
4. 50 A.B.A.Rep. (1925) pages 41-2.

ample evidence of the community of interest. This conclusion was confirmed when representatives of the legal profession in England, Ireland, Scotland and France came, in 1930,[5] to Canada and the United States as guests of the Bar Associations of these two countries. It became clear that the members of the profession of law, in those groups at least, had a great deal in common with us.

Comparative Law Congress at The Hague (1932)

In August of 1932 there was an International Congress on Comparative Law in The Hague, Holland. Representatives of our Association attended. In the succeeding October, our Association, meeting in Washington, D. C., adopted the recommendation of its Executive Committee that: "As a result of the report of the American Bar Association to the International Congress of Comparative Law at The Hague, your Committee recommends the appointment of a Special Committee to consider the question of international Bar relations."[6]

The Committee was created. At the Annual Meeting of the Association at Milwaukee in 1934 it filed an informing report. The report specified four professional bodies as bearing the term "International" in their names. They were then described, in part, as:

> (1) The "International Law Association," founded in 1873, has an individual membership of some 2500, in some twenty-five countries. It meets annually in different capital cities, and publishes annual volumes of its proceedings. Its meetings concern themselves mainly with programs of specific topics of substantive law (chiefly maritime law) with a view to the assimilation of law in those fields. . . .
>
> (2) The "International Lawyers Occupational Society" (Internationale Anwaltliche Arbeitsgemeinschaft) has its headquarters in Vienna, and is based on individual membership. The members are in some eighteen different countries, mostly Austria and Germany, and its President has usually been an Austrian or a German. Its aims include the facilitation of personal practice. . . .
>
> (3) The "International Bar Association" was organized some ten years ago on the West Coast of the Pacific Ocean to bring together the lawyers of China, Japan, and the Philippines. Its first President was Rokuichiro Masujima, the eminent Japanese lawyer who has been the guest of this Association; its second President was José Abad Santos, now Associate Justice of the Philippines Supreme Court. But recent Oriental events have for the time being put an end to its usefulness.
>
> (4) The "International Union of Advocates" (Union Internationale des Avocats), is the only one organized on a representative basis, i.e., membership of organized Bars, who send delegates to the annual meetings. It was founded in 1938, adopted its Constitution in 1929 (February 16), and received a Belgian charter January 20, 1930 (see *Moniteur Belge*, January 23, 1930), under the Belgian Law of October 25, 1919, pertaining to international associations. Its corporate domicile is Brussels. Its delegates meet annually, in different countries. It publishes its annual proceedings. Its membership now represents the Bars of fifteen nations, and unofficial observers from three or four other Bars (including the English General Council of the Bar and the American Bar Association) have attended its last few meetings.[7]

International Union of Advocates

A recommendation that a Committee be appointed to confer with the International Union of Advocates, to consider the possibility of affiliation of our Association with that Union, and that the subject be alloted to the Association's Section of International and Comparative Law, was adopted.[8] At the Annual Meeting of 1936 at Boston it was voted that affiliation with the Union be duly approved by the Association and that delegates be appointed to attend the next meeting of the Union.[9]

The extent of the participation of the delegates or members, of our Association in the Union does not appear to have been recorded in the Association's annals. Such participation, however, was not, has not at any time been, widespread as to number or intensive as to activity. The lawyers of the units of the British Commonwealth have not been members of the Union. While the membership of the Union has extended to other countries outside of western Europe,[10] there has been an impression that the enterprise has been one making its primary appeal to the members of the legal profession in western Europe. The American Bar Association appears to have been continued as a member of the Union,[11] although, beginning with World War II, the Union has been dormant and is not known to have resumed active functioning.

The Inter-American Bar Association

At the Kansas City (1937) Annual Meeting of the Association, the Section of International and Comparative Law proposed that at the Eighth International Conference of American States scheduled to be held in Lima, Peru, in 1938, representatives of the Bar Associations of the twenty-one American Republics meet and prepare projects on certain comparative law problems pertaining to the Americas. This proposal was adopted.[12] A result was that at the 1939 Annual Meeting at San Francisco, the Section reported that uniformity of law in the western hemisphere would best be furthered by establishing an Inter-American Bar Association.[13] The Section's request for authority to explore and report on the subject was approved at the mid-winter meeting of the House of Delegates in January of 1940.[14] The outcome was the Constitution of the Inter-American Bar Association (signed on May 16, 1940, at the close of the Eighth American Scientific Congress at Washington) and a proposal of the

5. 55 A.B.A.Rep. (1930) pages XXXIII-LI.
6. 57 A.B.A.Rep. (1932) pages 356, 42.
7. 59 A.B.A.Rep. (1934) pages 620-26.
8. 59 A.B.A.Rep. (1934) page 217.
9. 61 A.B.A.Rep. (1936) pages 273-77; See, also, pages 346-47.
10. In 1932 the Federation of the Bar Associations of Argentina was a member. In 1934 there were members from fifteen Nations in the Union. 59 A.B.A.Rep. (1934) page 623.
11. The year 1939 appears to be the most recent year in which the American Bar Association has paid dues to the Union. See 64 A.B.A.Rep. (1939) page 119.
12. 62 A.B.A.Rep. (1937) page 393.
13. 64 A.B.A.Rep. (1939) page 399.
14. 65 A.B.A.Rep. (1940) pages 413-15.

membership of our Association in that organization. Both were approved by the House of Delegates at the 1940 Annual Meeting in Philadelphia.[15]

The Inter-American Bar Association is thus a federation of the member Bar Associations of the different countries. It is not open to individual membership.

The Inter-American Bar Association had for additional background the exchanges of visits and cooperation among the Bar Associations of Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay, which had begun in 1926. The formation of the new organization was followed by its conferences in Havana (1941), Rio de Janeiro (1943), Mexico City (1944), and Santiago, Chile, in 1945. The Canadian Bar Association joined the organization at its beginning. Currently, the lawyers of nineteen of the twenty-two American countries are represented in that Association through their National, State, local or special Bar Associations.

The Fifth Conference is scheduled to be held in Lima, Peru, on April 6-18, 1947. Seventeen Committee Round-Tables, to which are allotted topics of interest in the international and comparative fields of law, will confer and present their conclusions for consideration by the Conference.[16]

The Inter-American Bar Association has had its pioneering difficulties, at times, but seems to have caught the imagination and interest of many lawyers of the Americas, to a gratifying degree. Many of them have participated in its functioning, undeterred by the obstacles interposed by war-time travel priorities, censorship, disrupted currency values, and many other discouragements, which would have been fatal to an enterprise of less inherent vitality and merit. Hundreds of lawyers from the United States (to a large extent members of our Association) have attended the four Inter-American conferences. They have been active in working out the patterns for satisfactory operation and increased usefulness.

Individual Membership Organizations in International Law

There are two historic organizations existent and operative in the field of international law, to which they have made many scholarly and constructive contributions. Each was founded in 1873; each has great authority in its field.

The Institute of International Law has a limited and carefully selected membership. The various National groups of its members propose candidates for election by the Institute. The Institute will meet at Neuchatel in 1947. It publishes one or two volumes of the proceedings and papers at each of its conferences.

The International Law Association has likewise an honorable history of scholarly service in its field. It has branches in many countries, including the United States, and is open to the membership of American lawyers, on application. The Chairman of the American Branch is William S. Culbertson, an active member of the American Bar Association, who practices in Washington, D. C.

During World War II, the activity of the International Law Association was confined almost wholly to the universities at Oxford and Cambridge, in England; but efforts are well under way to restore it to full-scale international functioning. To that end it held its Forty-first Conference at Cambridge, England, August 14 to 24, 1946, the first since that held at Amsterdam in 1938. The Forty-first Conference recorded its recognition of the growing responsibility and opportunities of the Association by the appointment of a special Committee on the General Policy (including the Constitution) of the Association.

Its present Constitution states "The objects of the Association include the study, elucidation and advancement of International Law, public and private, the making of proposals for the solution of conflicts of laws and the furthering of international understanding and good will." In the "Report of the Fortieth Conference, Amsterdam, 1938," it was stated: "The Association welcomes to its membership not only lawyers, whether or not specialists in International Law, but shipowners, underwriters, merchants, and philanthropists, and receives delegates from affiliated bodies, such as Chambers of Commerce and Shipping, and Arbitration of Peace Societies, thus admitting all who, from whatever point of view, are interested in the improvement of international relations". The Association publishes a valuable volume of the papers and proceedings at each Conference. The American Branch of the Association consists of its members who are citizens of or who reside within the United States of America or Canada.[17]

The United Nations League of Lawyers

During the San Francisco Conference of The United Nations, in 1945, some efforts were made to organize lawyers in attendance. The success attending the cooperation and joint proposals of the Canadian and American Bar Associations were deemed to open new vistas of international cooperation among lawyers.

For the most part, officers and members of the American Bar Association present in San Francisco did not take part in the efforts to form The United Nations League of Lawyers, and have not done so since. This League was formally established in Washington, D. C., on March 30, 1946. Its stated purposes are

15. 65 A.B.A.Rep. (1940) page 96.

16. The current officers of the Association include: President Dr. Hernando de Lavalle of Lima, Peru; Chairman of the Executive Committee George Maurice Morris of Washington, D. C.; Secretary-General William Roy Vallance of Washington, D. C.; Treasurer Miguel Macedo of Mexico City, Mexico. Vice Presidents serve for each of the countries which is represented in the membership of the Association by organizations of the Bar.

17. Lord Porter of England was President of the Law Association's Forty-first Conference. Secretary-General Trygve Lie of The United Nations is Honorary Vice President. The next Conference of the Association is scheduled to be held in Prague, Czechoslovakia, in the late summer of 1947.

18. The officers elected by the League for the ensuing year included President, Sir Hartley Shawcross, Attorney General of England and Wales; Secretary-General, Howard LeRoy, Washington, D. C.; Treasurer, Mary M. Connelly, Washington, D. C.

To establish and maintain cooperative relations among the lawyers of The United Nations; to advance the science of law in all its phases; to foster the study of international law and comparative law; to encourage the development of law as the basis of international relations; to encourage the use of arbitration and judicial settlements in international disputes; to study and support the Charter of the United Nations and, by these means, to further the cause of friendship, peace and goodwill among nations.

"Any lawyer or jurist is eligible to apply for membership in the League regardless of the country of his citizenship." The program includes the work of committees and other activities similar to those of Bar Associations.

Lately an effort has been made to put the League on a representative basis and enlist the participation of British leaders. Its first annual conference was held in Washington, D. C., last November 22. It was said that lawyers and representatives from twenty-eight Nations were present.[18]

International Association of Democratic Lawyers

At Paris on last October 24-27, delegations of jurists from twenty-four Nations are reported to have voted to organize the International Association of Democratic Lawyers. A provisional executive board was elected, which is scheduled to meet in April in New York City, to draft a constitution to be adopted at the next congress, which is planned to take place in Brussels in July.

The expressed general opinion has indicated that this Association will be a federation of associations rather than an association of individuals. Headquarters are in Paris, with another office to be opened in New York City in charge of the Secretary for the Western Hemisphere.

The polemic aims of the International Association of Democratic Lawyers, as set forth in a Resolution adopted at the Paris meeting, are

To facilitate contact and exchange between the jurists of the world for the purpose of developing a spirit of mutual understanding and fraternity; to work for the progress of juridical science and international law; to cooperate for the realization of the aims of the United Nations through common action of the jurists in support of the defense, development and practice throughout the world of democratic liberties; national and international agreements for the punishment of war criminals and the extirpation in the domain of jurisprudence of the vestiges of fascism, and joining in these efforts with all other groups in order to assure respect for international law in international relations and the establishment of a durable peace.[19]

The International Bar Association

The American Bar Association has recently renewed its examination of the potentialities of a universal international federation of organized Bars. This began with the appointment in 1944 of a Committee on Organization of an International Bar Association, as a Committee of the Section of International and Comparative Law.[20]

At the July (1946) meeting of the House of Delegates, the President of our Association was authorized to invite national units of the organized Bar to send representatives to a meeting in New York City, for the purpose of considering and agreeing upon a constitution for an International Bar Association.[21]

President Willis Smith sent such invitations, with the result that on October 8 and 9, representatives of the Bar Associations of twenty countries on five Continents met at the House of the Association of the Bar in the City of New York. Endorsement of the proposal from Bar organizations in ten other countries, unable to have representatives present, was recorded. The organizing group drafted a constitution and appointed a Committee for Organization of the International Bar Association.[22] At the Atlantic City meeting of the American Bar Association on October 29-November 1, the House of Delegates voted that our Association should accept membership in the International Bar Association subject to the withdrawal provisions set out in that document.[23]

The purposes of the International Bar Association as stated in its proposed Constitution are

To advance the science of jurisprudence in all its phases and particularly in the areas of international and comparative law; to promote uniformity in appropriate fields of law; to promote the administration of justice under law among the peoples of the world; to promote in their legal aspects the principles and aims of the United Nations; to establish and maintain friendly relations among the members of the legal profession of the world; to cooperate with, and promote coordination among, international juridical organizations having similar purposes. This is a non-political organization.

Membership is open to any National organization of the legal profession as defined, and includes organization of "attorneys, counselors, solicitors, barristers, advocates, judges, professors of law, *et cetera.*" Individual members of the legal profession may be elected patrons of the Association and entitled to attend all the International Conferences of the Legal Profession and sessions of the House of Deputies and to participate in the symposiums of such Conferences. Agreements for cooperation

19. The provisional officers elected at Paris were: President, Honorable Rene Cassin, Vice President of the Council of State of France; Vice Presidents, Robert W. Kenny, Attorney General of California and National President of the National Lawyers Guild; Honorable Elwyn Jones, M. P., Parliamentary Secretary to the Attorney General of Great Britain; Professor A. Trainin, Member of the Institute of the Academy of Science of the U.S.S.R.; Honorable M. Chain, Vice Minister of Justice of Poland; Honorable M. le Baron Adrien VanDen Branden de Reeth, Attorney General of the Court of Appeals of Brussels. A sixth Vice President will be elected by the executive board to represent one of the nations of South America.

20. 69 A.B.A.Rep. (1944) page 69.

21. 32 A.B.A.J. 488 (August, 1946).

22. The members of the Committee are: Chairman, Robert N. Anderson, U.S.A.; Alfred Body, Australia; Otto Zucker, Austria; Ramiro S. Guerreiro, Brazil; C. J. Burchell, Canada; Luis Anderson Morua, Costa Rica; Paul J. Edwards, Czechoslovakia; Carlos Sanchez y Sanchez, Dominican Republic; Eduardo Salazar, Ecuador; Andre Prudhomme, France; Maurice E. Bathurst, Great Britain; Octavio Aguilar, Guatemala; Taghi Nassr, Iran; Edward V. Saher, Netherlands; Olaf Tellefsen, Norway; Alberto Ulloa, Peru; David Avram, Rumania; Konthi Suphamongkhon, Siam; Bernardo Rolland, Spain; Gustavo Herrera, Venezuela. Secretaries: For North and South America, Amos J. Peaslee, U.S.A.; for Europe, Africa, Australia and New Zealand, Robert Tenger; for Asia, Konthi Suphamongkhon.

23. As reported in the Proceedings of the House, elsewhere in this issue.

with other international organizations having similar purposes may be entered into by the Association Executive Council.

The principal offices shall be at or near the seat of The United Nations, and The International Conferences of the Legal Profession shall be at times and places to be fixed by the House of Deputies, the Association's controlling body. The officers include a President, a Vice President for each country represented in the Association by a National organization, a Speaker of the House of Deputies, a Secretary-General, and a Treasurer.

A meeting of the charter members of the International Bar Association is scheduled to be held in New York City on February 17, for the adoption of the Constitution, the inauguration of the House of Deputies, the election of officers and members of the Executive Council, the adoption of Provisional By-laws, and the disposition of such other matters as may properly come before the House of Deputies.

Meanwhile, there are, as always, some problems and difficulties to be ironed out, as to such an organization. One is the absence of Nation-wide and representative organizations or societies of lawyers, corresponding to the Canadian and American Bar Associations, in many of the countries. Another is the fact, pointed out by Canadian and British representatives at the New York meeting last October and discussed in considerable detail by Mr. Justice Robert H. Jackson in his Atlantic City address (33 A.B.A.J. 24), that independent Courts and independent legal professions were destroyed by the war or by totalitarian governments, in many of the countries. A third factor, in the minds of some American lawyers, is the ascendancy of Marxian-collectivist idealogies in the governments and legal thinking of many of the countries, whereas the lawyers and governments of Canada and the United States are devoted to individual liberty, private property, and the free enterprise system.

However, the sponsors of the new organizations believe that the lawyers from different countries are still likely to find much in common, in the backgrounds of the profession, and that international organization may be the means of an exchange of ideas and the strengthening of a world-wide devotion of at least the lawyers to the concepts of impartial justice and law.

Opportunities for Broadening of Outlook and Information

From the foregoing it appears clearly that through the many organizations existent or in formation there is presented to the individual American lawyer, a variety of opportunities to exercise his interest in international legal contacts, in either or both of two directions. In his individual capacity or status he may become a member of one or more organizations based on individual membership. In his capacity as the representative of a unit of the organized Bar he may take part in the functioning of such an organization based on the federation principle.

For a member of the Bar in the United States, this is no novelty. With our system of National, State and local and specialized organizations of the legal profession, we are accustomed to making such selections or combinations. In any event the very existence of these prospects on an international scale is a significant trend in a profession so long distinguished for the "individualism" of its members.

Atomic Energy and New International Law

■ Though there is a difference, as the Canadian delegate has argued, between the U. N. resolution and the American proposals, the difference is more apparent than it is real.

All are agreed that the treaty must be approved by the governments that sign it. Until they sign and ratify, they have what is now called "a veto,"—a new name for the old right of any sovereign government to reject a treaty it does not like. The whole policy of the United States is based on this veto; we will not sign a treaty which we do not think is a good treaty.

All are agreed—particularly since M. Molotov's recent speech—that all who sign the treaty are bound by what the treaty says. The Russians do not contend that, having agreed to a treaty, they or anyone else can by the veto refuse to observe or to enforce that treaty.

We must not think, as perhaps we often do, merely of a treaty which, if there is a charge of violation, has to be enforced by the Security Council. The enforcement will require a vast and complex and new body of laws in all countries—laws dealing with property rights, with mining, with patents, with the legal status of atomic officials and employees, with atomic bootlegging, and with no end of other matters.

The doing of this enormously difficult but immensely inspiring work of law making is the real answer to the problem of the veto. For the essence of the veto is that it exists wherever there is as yet no law and no specific agreement. The veto disappears, not by renouncing it, but as and when and where laws become definite and agreements specific.

Walter Lippmann in the New York *Herald Tribune*, December 21, 1946

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Xen Hicks:

Senior Circuit Judge: Sixth Circuit

■ This month we turn to the Sixth Circuit, the work of its Court of Appeals, and the engaging personality and distinguished career of its Senior Circuit Judge Xen Hicks, of the little town of Clinton, in East Tennessee. In his seventy-fifth year, he is completing thirty-four years of diligent service in the Courts of his State and the United States—nearly twenty-four years on a federal bench, nearly nineteen years in his present Court, of which he has been the Senior Circuit Judge since January 27, 1938.

Made up of the four States of Michigan, Ohio, Kentucky and Tennessee, which have a population totalling more than seventeen million, the Sixth is one of the most diversified of the federal circuits, in the range and differences of its territory, the enterprises and vocations of its people, the types of law business and litigation which arise, and the cases which find their way to the calendars of its Court of Appeals. In few, if any, circuits, are there greater contrasts in the life, work, and habits of thought of the people and their approach to the problems of law and government.

The Court of Appeals of the Sixth is made up of

Stanley Reed, Circuit Justice
Xen Hicks, Senior Circuit Judge
Charles C. Simons
Florence E. Allen
John D. Martin
Thomas F. McAllister
Shackelford Miller, Jr., Circuit Judges

The Sixth is the only Circuit in which a woman is a member of the Court of Appeals.

In the Sixth there are twenty United States District Judges actively serving, with one retired.

Sketch of Judge Hicks

■ While five Senior Circuit Judges have served longer than he on the Federal bench, only one received his judicial commission before Judge Xen Hicks began his career in the State Courts of Tennessee.

Judge Hicks is a product of East Tennessee—a region unique and celebrated in song and story.[1] Most East Tennesseans are individualists, have strong convictions, and are undisturbed by their non-conformity to the *mores* of the State's other two "grand divisions" as they are referred to in the Tennessee Constitution—Middle and West Tennessee. They have adhered to the Republican party since its formation and at each biennial session of the Tennessee General Assembly their senators and representatives form an articulate and effective minority. During the Confederate War the East Tennesseans were not only overwhelmingly Unionist in sympathy, but no area with a comparable population furnished more volunteer soldiers to the Northern armies.[2]

A native[3] East Tennessean who served four years as a Federal soldier was Judge Hicks' father, William R. Hicks. After the war he was elected Judge of the Circuit Court—Tennessee's *nisi prius* Court of general jurisdiction. He must have accomplished the difficult task of giving

1. *This Day and Time* by Mrs. Anne W. Armstrong, New York, Knopf, 1930.
The Southern Highlander and His Homeland by John C. Campbell, New York, Russell Sage Foundation, 1921.
Any of Maristan Chapman's works.
Heart of Old Hickory and Other Stories of Tennessee by Will A. Dromgoole, Boston, Arena Publishing Co., 1895.
Schoolhouse in the Foothills, by Ella Enslow and Alvin F. Harlow, New York, Simon & Schuster, 1935.
All Cats are Gray by Charles G. Givens, Indianapolis, Bobbs-Merrill, 1937.
Sut Lovingood's Yarns by George Washington Harris, New York, 1867. It has been contended that these yarns supplied the pattern for *Tom Sawyer* and *Huckleberry Finn*.
Three Brothers and Seven Daddies, by Harry H. Kroll, New York, R. Long and R. R. Smith, 1932.
Any of Mary N. Murfree's works (Charles Egbert Craddock, pseud.).
Discovering Tennessee by Mary Utopia Rothrock, Chapel Hill, University of North Carolina Press, 1936.

2. Admiral David Glasgow Farragut ("Damn the torpedoes; full speed ahead!") was born at Campbell's Station, Tennessee, not far from Clinton. Andrew Johnson (although born in North Carolina) was an East Tennessee Democrat.

3. Judge Hicks' grandfather, John H. Hicks, was born in Tennessee in 1820. His great-grandfather, Richard N. Hicks, settled in Tennessee's beautiful Sequatchie Valley at an early date.

general satisfaction to the lawyers of his circuit, for Judge Hicks is the possessor of a gold-headed cane which the Bar of the circuit presented as a token of esteem to his father.

Judge Hicks was born seventy-four years ago—fourteen years before his father went on the bench—in the small mountain town of Clinton. At nineteen he was graduated from a nearby college, significantly named for General U. S. Grant.[4] For his law course he went to Tennessee's blue-grass country and the law school of Cumberland University,[5] then one of the most renowned of the South. He and his classmate and roommate, Chief Justice Grafton Green[6] of the Supreme Court of Tennessee, received their LL.B.s in 1892. Shortly thereafter Judge Hicks returned home and entered upon active practice.

Conditions of His Early Practice

While Judge Hicks has always maintained his home at Clinton, in his practice he rode the circuit through several East Tennessee counties. His career at the Bar fitted him to meet the most rigorous requirements of those who believe that trial experience is an essential qualification for any judge. Opportunities were abundant. One proposition from which no Tennessee appellate judge has ever dissented is that more litigation originates in East Tennessee than in all the rest of the State combined; indeed, some have gone so far as to hold that during the period when Judge Hicks was at the Bar, all major controversies of the mountaineers and most minor ones eventually found their way into Court.

The East Tennessean is inclined to the view that no lawyer is entitled to retain his license unless he is able to hold his own in the give and take of the court room. Physically and mentally vigorous, fearless and forceful in advocacy, Judge Hicks participated in the trial of probably every kind of a case—civil or criminal—that later came before him as a State or Federal trial judge.

His capacity for work is demonstrated by the fact that during this busy period he found time to serve in many public positions—among others, city attorney, county attorney, member of the State Senate and assistant prosecuting attorney.[7] In the two decades of his practice he permitted himself only one sabbatical year during which he served as a captain in the Sixth U. S. Volunteer Infantry in the Spanish-American War.

Ten Years of Service on the State Bench

In the last half-century Tennessee has had only two Republican governors. Of these, Ben W. Hooper was a highly controversial character, but even Middle and West Tennessee Democrats are said to admit that he performed some creditable acts. One of these was his selection in 1913 of Judge Hicks as Judge of the Criminal and Law Court of the Second Circuit. The appointment evidently met with the approval of the people of the circuit, for when the Court became a Circuit Court Judge Hicks was in 1914 elected Circuit Judge without opposition, and in 1918, again without opposition, re-elected for a second term. He served an even decade on the State bench, until he was appointed United States District Judge in 1923.[8]

These were full years. Most of the circuit was mountainous. Two of its counties were inaccessible by railroad and at that time few of the highways were even graded. To get to Hancock County Judge Hicks had to travel overland for forty miles over one mountain and across two rivers which were frequently swollen. Fentress County[9] was equally inaccessible.

Held in High Respect by the People

These mountain people liked Judge Hicks and he liked them. He once described them as "on the whole honest, intelligent, debt-paying, God-fearing folk." They had great respect for the courts. Young and old alike stood uncovered in Judge Hicks' presence and all made way for him as he walked from his lodgings to the court house. Typical of these people is Alvin York, who was born and still lives in Fentress County. Judge Hicks of course knew Alvin York and all the members of his family, for he was as well acquainted with the people of his circuit as he was with his fellow townsmen at Clinton.[10]

The difficulty of travel was not the only burden imposed by this rugged circuit. The dockets were heavy, and Judge Hicks had hard work in disposing of them. Some of the counties were criss-crossed by railroads and dotted with coal mines and other industries which gave rise to intricate and important litigation. So absorbing were Judge Hicks' duties that he was at home only three or four weeks a year. Many of the cases tried before him were appealed to

4. A.B. (1891) Grant University, Athens, Tennessee (now Tennessee Wesleyan College).

5. Located at Lebanon, near Nashville.

6. Chief Justice Green writes of his classmate and roommate:

"Judge Hicks, while circuit judge in Tennessee, established a reputation as an able and discriminating judge. Since he has been on the Federal Circuit Court of Appeals, so fas as I have seen, he has accurately applied Tennessee decisions in which they were controlling. All his opinions that I have read seem clear and cogent and reflect credit upon him."

7. In Tennessee the public prosecutor is titled District Attorney General. Judge Hicks sponsored, and was largely responsible for the passage by the Tennessee General Assembly of the Juvenile Court Act. Tennessee Public Acts 1911, Chap. 58.

8. Judge Hicks' circuit (the 19th) comprised eight counties and substantially coincided with his father's old circuit (the 2nd) where William R. Hicks had served for sixteen years.

9. Jamestown, the county seat of Fentress County, had been the home of Orion Clemens (Mulberry Sellers), the father of Mark Twain. Samuel Clemens was born three months after his father moved from there to Missouri. The first scenes of Mark Twain's *Gilded Age* are laid at Jamestown. Cordell Hull was circuit judge (1903-07) of the Fifth Circuit, most of which counties adjoin Judge Hicks' circuit but which at the time of Judge Hull's incumbency included Fentress County.

10. It was said of Judge Hicks that at this time he knew the people of East Tennessee so well that on hearing a name he could nearly always guess the county and the locality that the person came from. A member of Judge Hicks' family is authority for the statement that many people came to his home over the weekend to see the Judge about getting their "men" out of jail. On one occasion a woman came with seven or eight children whom she lined up for inspection by the Judge in order to arouse his sympathy. Judge Hicks being away, the same woman returned the following weekend with the same number of children, but the Judge's daughter discovered that they were not the same children who had accompanied her on the first visit.

the Supreme Court of Tennessee, but few were reversed.[11]

Nineteen-twenty was an especially onerous year for Judge Hicks; that year he presided in twenty trials for murder, resulting in eighteen convictions. All of the death sentences were appealed and affirmed, and there were seven electrocutions.

Appointment as a Federal District Judge

It was because of his excellent record as a State trial judge that President Harding in 1923 nominated Judge Hicks as United States District Judge for the Eastern and Middle Districts of Tennessee, to succeed Judge Edwin T. Sanford, who had been elevated to the Supreme Court of the United States.

The transition from the State to the Federal bench was quickly accomplished. Most of Judge Hicks' work had been done in the Eastern District, which embraced the entire East Tennessee "grand division" of the State, including Judge Hicks' old circuit. Except for those which contained the cities of Knoxville and Chattanooga, most of the counties of the district were similar to those with which Judge Hicks was already so intimately acquainted. He therefore came to the Federal bench with a thorough knowledge of the people, the problems and the business of his district.

Moreover, he had previously had considerable practice in the Federal Courts, and was familiar with all the categories of litigation which were likely to come before it. On the State bench Judge Hicks had become well versed in "the judicial process", and had proved himself extraordinarily capable. However, for ten years he had had no contact with Federal practice and procedure. Cases tried under the Conformity Act gave him no concern, for his varied experience as Circuit Judge had made him an expert in Tennessee practice. But he was required by force of circumstances to master quickly the unique intricacies of the old Federal practice, for he was confronted with a heavy task.

When he left the district bench, its docket was current. That this was accomplished without any sacrifice of justice is evidenced by the fact that of fifty-seven of his decisions which were appealed, all but six were affirmed.

Elevation to the Circuit Court of Appeals

On the nomination of President Coolidge Judge Hicks became a member of the Circuit Court of Appeals on June 12, 1928. For nine years he has been the Senior Circuit Judge for the Sixth Circuit.

Since the organization of the Circuit Courts of Appeals in 1890 the Sixth Circuit has consistently had an excellent record in the administration of justice. Above the bench in the court room at Cincinnati are the portraits of three judges (Howell E. Jackson, Horace H. Lurton and William R. Day) who went from it to the Supreme Court, and of one (William Howard Taft) who became Chief Justice of the United States.

Marked Diversity in the Sixth Circuit

No doubt one reason why its opinions are so frequently cited is the great variety of the questions with which it has dealt. This is the result in part of the marked diversity of the area which comprises it. It slices the heart of the Nation from North to South—from the Canadian border to the North line of the Gulf state, Mississippi. Cases come to it from "the Western Waters"—the Ohio and Mississippi; from the Great Lakes; from the Ohio farmlands and the cotton plantations along its southern boundary; from the blue-grass country and the mountains of Kentucky and Tennessee; from the great industrial cities of Cincinnati; Cleveland and Detroit.

The Sixth has escaped few problems that have been posed for any other Circuit Court of Appeals east of the Mississippi. It has had its quota of cases in the specialized fields of admiralty and patent law. Some of the seacoast circuits have decided more admiralty cases, but the Sixth is near the top in dealing with important patent litigation.[12]

Although when Judge Hicks became a Circuit Judge he had had little experience in patent work, he demonstrated his balanced judicial competency by quickly mastering its intricacies, and has written forty-eight patent opinions, covering a wide range from foundation garments for women to a method of carburetion for multiple-cylindered engines.[13]

The work of the Court has constantly increased. Prior to Judge Hicks' appointment it consisted of three judges; he became the fourth

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11. Some of the interesting and significant Tennessee cases in which Judge Hicks was affirmed are: *Watson v. State*, 133 Tenn. 198; *Todd v. Railroad*, 135 Tenn. 92; *Morgan County v. Goans*, 138 Tenn. 381; *C.N.O. & T.P. Ry. Co. v. Morgan*, 139 Tenn. 27; *Mays v. State*, 145 Tenn. 118; *McElroy v. State*, 146 Tenn. 442; *Wireman v. State*, 146 Tenn. 676. The *McElroy* and *Wireman* cases are erroneously reported as having been tried before other judges.

12. One of the Sixth Circuit judges jocularly complained recently because a clutch patent case was not assigned to him, saying that except for clutches, his opinions had fully covered the automobile.

13. Judge Hicks' patent opinions are:
Economy Baler Co. v. Solar Sturges Mfg. Co., 29 Fed. (2d) 656.
Condit v. Jackson Corset Co., 35 Fed. (2d) 4.
Metropolitan Device Corp. v. Cleveland Electric Illuminating Co., 36 Fed. (2d) 477.
Rowley v. Rowley, 39 Fed. (2d) 865.
Woolworth v. Emery, 42 Fed. (2d) 398.
United Shoe Mach. Corp. v. Day Wood Heel Co., 46 Fed. (2d) 897.
Fowler v. Detroit Bedding Co., 47 Fed. (2d) 752.
Ohio Galvanizing & Mfg. Co. v. Mercury Mfg. Co., 49 Fed. (2d) 895.
Cleveland Automatic Machine Co. v. National Acme Co., 52 Fed. (2d) 769.
Sands Mfg. Co. v. Charles Smith, 53 Fed. (2d) 459.
Blackmore v. Ford Motor Co., 56 Fed. (2d) 806.
Ford Motor Co. v. Ohio Stamping and Eng. Co., 56 Fed. (2d) 807.
United Shoe Mach. Corp. v. H. Gordon Co., 59 Fed. (2d) 903.
Sherwin-Williams Co. v. California Spray Chem. Co., 61 Fed. (2d) 297.
Zimmers v. Allied Metal Products Co., 61 Fed. (2d) 534.
Central Brass Mfg. Co. v. Republic Brass Co., 63 Fed. (2d) 287.
Devin v. Western Wheeled Scraper, 66 Fed. (2d) 631.
Remington Rand v. Master Craft Corp., 67 Fed. (2d) 218.
Union Switch & Signal Co. v. Louisville Frog Switch & Signal Co., 73 Fed (2d) 550.
Brown-Brockmeyer Co. v. Master Electric Co., 76 Fed. (2d) 688.
Stockham Pipe & Fittings Co. v. Ohio Steel Fdry Co., 78 Fed. (2d) 111.
Loeber Hair Goods Co. v. H. W. Gossard Co., 87 Fed. (2d) 98.

member when Congress authorized an additional judge. There are now six Circuit Judges, and during the same period the number of District Judges in the circuit has been increased from ten to twenty.[14]

Scope and Variety of Judge Hicks' Opinions

During his incumbency as Circuit Judge, Judge Hicks has sat in 2130 cases and has written opinions, including dissents, in 467 cases. Unlike some judges, he has specialized in no particular field; one of his salient characteristics is his versatility in dealing with significant cases of first impression. He presided over the initial sitting of his Court *en banc* and wrote the opinion in the first treason case to reach a United States appellate court[15]—an opinion that admirably discloses the meticulous care he exercises in disposing of every substantial insistence made in an important case. He interpreted the Lindbergh (kidnapping) Act, holding that the jury was warranted in recommending the death penalty under the facts of the case and affirming the sentence.[16] He established liability for double assessment of stockholders of a holding company which in turn owned the stock of defunct national banks,[17] he limited the bargaining rights, under N.L.R.A., of armed guards and others who had taken an oath as military police of the United States Government, emphasizing the obligation of the National Labor Board to perform its duties in the interest of the public.[18]

Only one of Judge Hicks' opinions negates the validity of an Act of Congress. This held unconstitutional, on the ground that there must be a logical connection between the proven and presumptive facts, a statute enacting that a firearm found in the possession of one who had been convicted of a crime of violence would be presumed to have been transported in interstate commerce in violation of the Federal Firearm Act.[19] Nor has Judge Hicks been inclined to invalidate State legislation. Typical of this attitude is his opinion holding the Tennessee poll tax requirement for voting constitutional, even as to election of a Federal official, in this instance a representative in Congress.[20]

Although few Circuit Judges have more frequently voted to affirm criminal cases, Judge Hicks is always alert for any substantial invasion of the rights of the accused. He is inclined to pay close attention to any claim that evidence has been improperly obtained,[21] and is not reluctant to reprehend officers for the improper or careless use of firearms.[22] In such cases his conclusions rest—to use the language of Judge Joseph C. Hutcheson, Jr., which he once quoted—"not so much upon a higher critical examination of the accumulated decisional gloss as upon a common sense determination."[23] Thus, in a case where the Supreme Court reversed because the record suggested that confessions were improperly obtained, he did not upon another appeal hesitate to write an affirmance of a second conviction when he believed that on the new trial the government had sufficiently proved that no statutory or constitutional right of the accused had been invaded.[24]

An opinion of Judge Hicks' which is frequently cited and relied upon is an excellent exposition of the scope of review by an appellate court of an order of the National Labor Relations Board.[25]

Judge Hicks has always enjoyed the equity side of the dockets in both the District and Appellate Courts; he has also maintained his keen

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Byrne Mfg. Co. v. *American Flange & Mfg. Co.*, 87 Fed. (2d) 783.

Commercial Shearing & Stamping Co. v. *Youngstown Steel Car Corp.*, 87 Fed. (2d) 862.

Monarch Marking Systems Co. v. *Dennison Mfg. Co.*, 92 Fed. (2d) 90.

Riddell, Inc. v. *Goldsmith*, 92 Fed. (2d) 353.

Shearer v. *Atlas Radio Co.*, 94 Fed. (2d) 304.

Peale-Davis v. *West Kentucky Coal Co.*, 95 Fed. (2d) 655.

Goodrich v. *Ford Motor Co.*, 97 Fed. (2d) 427.

R. C. Mahon Co. v. *Detroit Steel Products Co.*, 107 Fed. (2d) 335.

Westinghouse Air Brake Co. v. *Schwarze Elec. Co.*, 108 Fed. (2d) 352.

LaBour v. *Gorman-Rupp Co.*, 108 Fed. (2d) 279.

Cincinnati Rubber Co. v. *Stowe Woodward Co.*, 111 Fed. (2d) 239.

Dayton Tire & Rubber Mfg. Co. v. *Stagnaro, et al.*, 101 Fed. (2d) 808.

Service Station Equipment Co. v. *Air Scale Co.*, 100 Fed. (2d) 498.

General Tire & Rubber Co. v. *Fisk Rubber Corp.*, 104 Fed. (2d) 740.

Univis Corp. v. *Rips, et al.*, 104 Fed. (2d) 749.

Goodwin v. *Carloss Co.*, 116 Fed. (2d) 644.

May Dept. Stores Co. v. *Paolucci*, 120 Fed. (2d) 796.

N.S.W. Co. v. *Wholesale Lbr. Co.*, 123 Fed. (2d) 38.

Kelly-Koett Mfg. Co. v. *McEuen*, 130 Fed. (2d) 488.

Merco Nordstrom Valve Co. v. *W. M. Acker Org., Inc.*, 131 Fed. (2d) 277.

Johnston v. *Atlas Mineral Products Co.*, 140 Fed. (2d) 282.

Universal Products Co. v. *Montgomery Ward Co.*, 146 Fed. (2d) 957.

Clarage Fan Co. v. *B. F. Sturtevant*, 148 Fed. (2d) 786.

Hawkinson v. *Wilcoxen*, 149 Fed. (2d) 471.

Crampton v. *Crampton*, 153 Fed. (2d) 543.

General Metals Powder Co. v. *S. K. Wellman Co.*, 157 Fed. (2d) 505.

14. The Court has made marked progress in the last five years in the time required for the disposition of appeals brought to it. The docket is now current and cases are heard promptly after briefs are filed. The time that elapses between docketing and argument averages between sixty and ninety days. Because of the illness of Judge C. H. Moorman, Judge Hicks became Acting Senior Judge in 1936 and served in that capacity until Judge Moorman's death in 1938. When Judge Hicks assumed his duties as Acting Senior Judge, cases pended on the calendar thirty-six months before being reached for hearing. When the Court convened for the October 1938 term, there were approximately 370 cases on the docket. At the commencement of the 1946 term, 170 cases were pending.

15. *Max Stephan* v. *United States*, 133 Fed. (2d) 87; certiorari denied, 318 U. S. 781.

16. *Thomas Henry Robinson, Jr.* v. *United States*, 144 Fed. (2d) 392; affirmed 324 U. S. 282.

17. *Barbour, et al.* v. *Thomas, Receiver*, 86 Fed. (2d) 510, arising out of the Detroit bank failures of 1933. Certiorari denied 300 U. S. 670.

18. *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 146 Fed. (2d) 718; certiorari granted December 23, 1946.

19. *William Minski* v. *United States; Delia* v. *Same*; 131 Fed. (2d) 614; certiorari granted *(Delia)* 318 U. S. 748; affirmed *sub nom. Tot* v. *U. S.; U. S.* v. *Delia*; 319 U. S. 463. (A judgment of the Circuit Court of Appeals for the Third Circuit, contrary to that of the Sixth Circuit, was reversed); certiorari denied *(Minski)* 319 U. S. 775.

20. *Pirtle* v. *Brown*, 118 Fed. (2d) 218; certiorari denied 314 U. S. 621.

21. *United States* v. *Costner*, 153 Fed. (2d) 23, holding that a search and seizure were unreasonable when officers shot into the tires of an automobile being driven at eighty miles per hour by one suspected of having in his possession untaxed liquor.

22. *Fish* v. *Michigan*, 62 Fed. (2d) 659.

23. *In re Ginsburg*, 147 Fed. (2d) 749.

24. *McNabb* v. *United States*, 142 Fed. (2d) 904; certiorari denied 323 U. S. 771. The charge in this case was the murder of an Internal Revenue officer. The locale was that East Tennessee country of the same type that comprised Judge Hicks' state circuit. The first opinion of the Circuit Court of Appeals for the Sixth Circuit, written by Judge John D. Martin, contains a vivid and colorful description of the crime. *McNabb, et al.* v. *United States*, 123 Fed. (2d) 848.

25. *National Labor Relations Board* v. *Sparks-Withington Co.*, 119 Fed. (2d) 78, certiorari dismissed on motion of petitioner, 314 U. S. 703.

interest in questions of practice and procedure. In an involved reorganization case he welcomed the opportunity to discuss the weight to be given the findings of the Master and District Judge, writing as always succinctly and with admirable lucidity.[26]

The reluctance of the Supreme Court to deal with common law questions has so increased that only one[27] of its 137 opinions delivered during the last term was without some Federal question. The result is that the Circuit Courts of Appeals have become in reality Courts of last resort for a large number of cases in which the jurisdiction of the District Court was based solely upon diversity of citizenship. Judge Hicks' ten years as a State Judge and five years as a District Judge have admirably equipped him for deciding cases of this nature.

Illustrative of his approach and reasoning are his opinions in three leading cases: One fixing the common law liability of bank directors for negligence in supervising the activities of the bank's officers;[28] another construing a clause in an insurance policy denying recovery of double indemnity for death where insured "participates in aviation or aeronautics" so as to permit recovery where death of a passenger resulted from the crash of a commercial airliner;[29] and a third applying the law of libel to almost incredible facts of mistaken identity.[30]

Judge Hicks, despite the eminence to which he has attained, does not flinch from laboring in the dreary fields of "facts". His training and experience have conditioned him to respect the realities; he does not decide cases *in vacuo*. Rather, with painstaking care and self-effacement he examines the data included in the printed record; he marshals, rearranges, analyzes, synthesizes it; he brings it to life and traces it from a definite point of beginning through a charted course to a point of conclusion—and inexorably his legal conclusions are shaped by this process.[31]

Cases that turn upon the common law probably most accurately disclose Judge Hicks' methods and best illustrate the style of his opinions. There is always a willingness to follow binding authority; there are few citations and these only of cases directly in point; no authority is relied upon without having been carefully examined—not even an earlier opinion written by himself. When the law is not definitely settled there is rarely an attempt to deduce a rule from a multitude of conflicting cases or from oblique opinions of other judges; instead, the holding is based upon reason and the dictates of justice. There is no pontification, no generalization, no dictum. The sentences are lean and devoid of ornament, the opinion succinct. Words are used for their precise denotations, not their suggestive connotations. Clarity, not fine writing, is the objective. His metier is neither the sparkling epigram nor the quotable phrase, but exact exposition. He is of the school of Hughes, not that of Holmes or Cardozo.

Terseness and Restraint on the Bench

Always there is a terseness amounting almost to reticence which is characteristic of many East Tennesseans. On the bench he is not an overspeaking judge. If he does not go quite so far as St. Paul and suffer gladly those who speak unwisely and beside the point, at least he does suffer them patiently. He always permits counsel to open his case fully; indeed, he rarely at any stage interjects a remark or question, and then only when the thread of argument disappears in a fog of obscurity or when there is an obvious waste of time. This reserve of Judge Hicks' is not a recently acquired trait. Not only was it noticeable when he first went on the Circuit bench, but he was never loquacious as a District Judge.

The young lawyer who appears at the opening of Court at 9 A.M. for enrollment and immediately thereafter argues his first case is usually so impressed by Judge Hicks' dignity and silent restraint that he thinks he senses about the Senior Judge and the Court an aura of austerity. Experience, however, soon convinces him that the Sixth Circuit Court is a delightful tribunal before which to argue a case. That experience almost always begins that same afternoon, when he is taken to Judge Hicks' chambers for a personal introduction. He is likely to find the dignified gowned judge of the morning with his coat off and his office in disarray, hard at work on an opinion or some problem of Court administration.

Genial and companionable as well as informal, Judge Hicks is never too busy to greet either an old friend or a young lawyer. No one meets him without being impressed by his naturalness and his unaffected interest in individuals, and few leave him without having enjoyed his quiet humor.[32] The fortunate learn that he is a gifted raconteur with a seem-

26. *Gochenour* v. *J. P. Morgan & Co.*, 111 Fed. (2d) 378.

27. *Fisher* v. *United States*, No. 122, 326 U. S. . .;90 L. Ed. 1078; Certiorari to the United States Court of Appeals for the District of Columbia to review a judgment affirming a conviction in the District Court of the United States for the District of Columbia, of murder in the first degree.

28. *Atherton, et al.* v. *Anderson, Receiver*, 99 Fed. (2d) 883.

29. *Massachusetts Protective Ass'n.* v. *Bayersdorfer*, 105 Fed. (2d) 595.

30. *Memphis Commercial Appeal* v. *Johnson*, 96 Fed. (2d) 672.

31. See cases cited *supra*, especially *Stephan*, *Robinson*, *Costner*, *Atherton*, *N.L.R.B.* v. *Sparks-Withington*. *Jarvis* v. *Shackelton Inhaler Co.*, 136 Fed. (2d) 116, sustaining an injunction against enforcement of fraud order of Acting Postmaster General, is an excellent example.

32. It has never been Judge Hicks' custom to indulge in witticisms while on the bench. However, nothing humorous escapes him. When he was a State judge, a prominent man who by his wealth and political influence dominated a rural county was subpoenaed as a witness in Judge Hicks' Court. The local tycoon told the clerk that he did not have time to fool around testifying in Xen Hicks' court. He was informed that he must attend anyway. When he entered the court room he was smoking a cigar. Cigar in hand the reluctant witness seated himself in a comfortable chair and failed to stand when the clerk began to administer the usual short oath. Judge Hicks stopped the clerk and ordered the witness to stand, stating the oath would be administered by the judge. Thereupon he commanded the witness to take "the long oath" which few judges or lawyers knew was in the Code, by repeating these words which the judge recited in solemn and measured tones:

"I do solemnly appeal to God, as a witness of the truth and the avenger of falsehood, and shall answer for the same at the great day of judgment, when the secrets of all hearts shall be known, that the evidence which I shall give in the case now on trial shall be the truth, the whole truth, and nothing but the truth, so help me God, upon penalty of the eternal damnation of my soul should I swear falsely." (Shannon's Tennessee Code (1896) Sec. 5552)

ingly inexhaustible fund of fresh and pungent stories, racy of his beloved mountains.[33]

When one reflects that this senior judge has not only a gentle sense of humor and liking for and understanding[34] of people but is a practicalist, not a dogmatist; is tolerant of the views of others and always willing to have his own challenged; that he wears no pride of office; then perhaps one has in part at least the clue to the unusual harmony which prevails in the Sixth Circuit Court of Appeals. If one could penetrate the conference room one would find the presiding judge always poised and quietly attentive to the divergent views expressed by his colleagues and would hear them affectionately refer to him as "The Captain". No lawyer at least will argue that any mundane judge has ever been invariably right; but Judge Hicks' admirers can claim for him that he has never been betrayed into any hasty or insufficiently considered utterance or action on the bench, in conference or in performing his administrative duties. Those who know him best will not be surprised to learn that of the 208 opinions which he has written since he has been Senior Judge only seven have been dissents, or that in the 940 cases in which he has sat during that time only twenty-seven dissenting opinions have been filed. Even more revealing is the fact that no one of these dissenting opinions, by whomever written, contains any ill-tempered language or caustic reference to the views of any other member of the Court.

Judge Hicks can spare little time from his judicial duties for outside activities.[35] When he is in need of rest or recreation some Antaeus-like instinct sends him back to his old home at Clinton. On its spacious grounds there is a magnificent grove of ancient trees which the judge refers to as his "Judicial Forest". Many of the oaks and elms have been named for those he admires in the judiciary. A mighty elm, towering above all the others, he long ago christened "Old John Marshall".

Thus fittingly subdued in the presence of his henchmen the recalcitrant witness abandoned his cigar, sat humbly in the witness box and presumably saved his soul by telling the truth.

33. Addressing the Sixth Circuit Judicial Conference in 1945, Judge Hicks illustrated the danger of a judge indicating his personal view of the facts when charging the jury. He told of a trial judge in a mountain county who thus charged the jury in an assault and battery case:

"Gentlemen of the Jury: You are the sole judge of the facts in this case and of the credibility of the witnesses. But if you believe from the evidence that this great, big, burly bully—which he is—assaulted and beat up this puny, little, weak shrimp—which he is—and that he beat him wilfully, deliberately, maliciously and without provocation—which he did—then it would be your duty to return a verdict for the plaintiff—which you must do—and to assess his damages at such amount as will compensate the plaintiff for his injuries—which would be the full amount for which he sues."

34. "Give thy servant an understanding heart to judge thy people, that I may discern between good and bad." I Kings III, 9.

35. Judge Hicks has attended every judicial Conference of Senior Circuit Judges that has been held since he began to preside over the Court. His outside reading consists chiefly of biography and history. He has all the available lives of the Chief Justices of the United States. He is a deeply religious man and his personal library contains ten biographies of Christ.

Representative Government the Hope of America

■ This is the hour of test and trial for America. By her prowess and strength, and the indomitable courage of her soldiers, she demonstrated her power to vindicate on foreign battlefields her conceptions of liberty and justice. Let not her influence as a mediator between capital and labor be weakened and her own failure to settle matters of purely domestic concern be proclaimed to the world. There are those in this country who threaten direct action to force their will upon a majority. Russia today, with its blood and terror, is a painful object lesson of the power of minorities. It makes little difference what minority it is; whether capital or labor, or any other class; no sort of privilege will ever be permitted to dominate this country. We are a partnership or nothing that is worth while. We are a democracy, where the majority are the masters, or all the hopes and purposes of the men who founded this government have been defeated and forgotten.

In America there is but one way by which great reforms can be accomplished and the relief sought by classes obtained, and that is through the orderly processes of representative government. Those who would propose any other method of reform are enemies of this country. America will not be daunted by threats nor lose her composure or calmness in these distressing times. We can afford, in the midst of this day of passion and unrest, to be self-contained and sure.

The instrument of all reform in America is the ballot. The road to economic and social reform in America is the straight road of justice to all classes and conditions of men. Men have but to follow this road to realize the full fruition of their objects and purposes. Let those beware who would take the shorter road of disorder and revolution. The right road is the road of justice and orderly process.

—From the Message of President Woodrow Wilson on the State of the Union, submitted on December 2, 1919, to the Second Session of the 66th Congress.

11

Military Government:

Administration of Occupied Territory

by **Eberhard P. Deutsch** • of the Louisiana Bar

■ The picture and pattern of Military Government in Germany and Austria (American Zone) have changed somewhat, but Col. Deutsch depicts its legal phases. Before entering military service in August of 1942, he was the head of a law firm in New Orleans. He is a veteran of both World Wars. Assigned overseas in May of 1943, he served in combat with the 45th Division during the Sicilian invasion, and also with the 82nd Airborne Division at the time of the Normandy landings. He has been awarded the Bronze Star and Purple Heart Medals, and holds a Presidential Distinguished Unit Citation. He has performed general administrative and legal duties in civil affairs and military government in and following combat, in various countries of Europe, and acted as principal legal adviser to General Mark W. Clark in the quadri-partite military administration of Austria. He received his law degree from the University of Tulane in 1925, and holds the honorary degree of Doctor of Jurisprudence from the University of Messina, Italy, conferred on him in 1943.

■ Little has as yet appeared in legal literature, though much is unquestionably destined to be written, on military government. This "function of command" has in the past been merely incidental to other phases of military conquest. In World War II, however, recognition was at last given by the War Department to the military importance of the maintenance of order in, and immediate reconstruction of, occupied enemy territory, in the close wake of tactical units.

This recognition was evidenced by the creation, in the European Theater, of a fifth general staff section, G-5, at each tactical command down to and including corps; with a new special (military government) staff section at divisions. Military government representation was even accorded at the regimental level. In each instance this staff was an integral part of the combat unit involved; for military necessity is always the primary underlying principle for the conduct of military government.

It should be noted at the outset that the following discussion relates principally to *military government*, which deals with the administration of occupied enemy territory (e.g., Germany, Austria), as distinguished from *civil affairs* which refers to friendly or liberated countries (e.g., France, Belgium).

It is impossible, within the limited scope of such an article as the present one, even to outline the various functions within the broad scope of military government. They range literally from the cabbages to kings of Alice-in-Wonderland fame. "The object of civil affairs control through military government", says the *Manual*,[1] "is to assist military operations, to further national policies, and to fulfill the obligation of the occupying forces under international law".

Suffice it to indicate that among the most important functions of military government are those performed by legal staffs. These legal functions form the subject of the present discussion.

Functions of Military Government

Military government does not itself ordinarily carry on governmental functions. It directs such functions by an indigenous government which it finds or sets up in occupied territory. It is carried out, however, by operational teams or detachments, called "carpet" personnel, as part of the forces of the commander of the tactical unit of the area involved, guided and supervised in turn for

1. United States Army and Navy Manual of Military Government and Civil Affairs, TM 27-5, OPNAV 50 E-3, Sec. 4, page 3.

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that commander, by his G-5 or military government staff. At army levels and above, each such staff, and each detachment except the smallest, contains legal officers.

It may be well to recall at this point, that the law of occupied enemy territory, in the words of the Duke of Wellington[2] "is neither more nor less than the will of the general who commands" the occupying army. This is subject, of course, to the limitations imposed by modern international agreements,[3] as well as by the control exercised over the military commander by his own government.

To all practical intents and purposes, however, the commander of the occupying forces embodies, within his official military person, the constitution, as well as the legislative, executive and judicial branches of the government of the territory occupied by his forces.

Importance of the Legal Phases

The importance of the legal phases of military government should at once become apparent from the brief outline given above. The broad scope of the work of military government legal officers may, for present purposes, conveniently be divided into the following categories: (1) Legislation; (2) Reestablishment of a National Ministry of Justice; (3) Reorganization of Indigenous Courts; (4) Reorganization of Bar and Notaries; (5) Establishment, operation and supervision of Military Government Courts; (6) Advice and Opinions.

Legislation in Occupied Territory

Legislation in the occupied territory consists of enactments of the military government, and such legislation of the indigenous government as is not suspended by the occupational commander, or as he requires or permits to be enacted by that government and its subdivisions or agencies.

Military government enactments vary in form, and cover a wide range of subjects. They include proclamations issued in the name of, and signed by, the theater commander, announcing the fact of occupation, the establishment of military government and instructing the civilian population as to their status and conduct in general.

Next, there are ordinances or laws, usually issued simply "By order of Military Government", on many fundamental subjects, such as crimes and offenses, suspension of certain local legislation, currency and foreign exchange, frontier control, censorship and communications, and so on.

Finally, there are notices or directions, covering limited areas or addressed to specific classes of persons, establishing curfew, regulating circulation of persons or vehicles, requiring the surrender of weapons, etc.

Each such enactment, by its very nature as a legalistic document, is drafted, revised, or at least required to be approved, by legal officers. And so too, legal officers must render assistance in the suspension of such indigenous laws of the occupied country as may affect the security of the occupying forces, or are contrary to their avowed war aims. In the latter category, by way of example, in Germany, were those laws providing wide executive and judicial latitude to protect the so-called "sound instincts of the people".

Legislation During and After Combat

During combat, the drafting of military government legislation, and the supervision of the enactment and suspension of indigenous legislation, were performed by the legal officers of each commander for his own zone of operations. In the case of Allied Commanders, the work was frequently done jointly by legal officers of both British and United States forces.

Following the cessation of hostilities, and the establishment of Quadri-Partite military government, new systems were devised. The Allied Councils of both Germany and Austria consist of the Commanders in Chief of the four occupying powers. Each Council has a Legal Directorate composed of the chiefs of the four Legal Divisions.

The legal functions of the military government of each country as a whole are accordingly performed by a Quadri-Partite Legal Directorate composed of United States, French, Soviet and British officials. In Germany, no central government has been established. Accordingly, national legislation in that country, other than the indigenous legislation existing at the time of occupation, and permitted to remain in force, consists of enactments prepared by the Quadri-Partite Legal Directorate and issued by the Allied Control Council. Indigenous local legislation is issued or suspended under the unilateral supervision of the legal officers of the zone command.

Military Legislation in Austria

In Austria, a national government was set up at once with the approval of the occupational authorities, followed, a few months later, by national elections, and the establishment of a central government, duly recognized by the governments of the occupying powers, but subject to continuing supervision and control by the Allied Council.

Accordingly, no military government legislation as such has been issued for application throughout the whole of Austria. Instead, the national legislative process has been carried on, at first by cabinet decree, and

2. Hansard's Debates, 3rd. Ser., cxv, 881.
3. See, for example, Hague Convention No. IV and Annex (Hague Regulations) of October 18, 1907, respecting the laws and customs of war on land, 36 Stat. at L. 2277 and 2295.

thereafter by Parliamentary enactment. But this legislation has been permitted to be promulgated and put into effect only after affirmative approval by the Allied Council.

All Austrian legislation has therefore been submitted, following enactment, to the Quadri-Partite Legal Directorate. This Directorate has recommended to the Allied Council approval, amendment or disapproval, of Austrian national legislation; and directions of the Council to the Austrian Government have been issued accordingly.[4]

Ministry of Justice Under Occupation

Re-establishment of a National Ministry of Justice is obviously a vast task. In Germany, as stated above, no national government exists as yet, and there is accordingly no such ministry. In Austria it was established at an early date, and it functions under the supervision of the Quadri-Partite Legal Directorate, with unilateral supervision of its functions within each zone of occupation.

The task has consisted primarily of purging the ministry of its Nazi personnel, and substituting officials whose political records, and whose standing and ability, permit their forming parts of the important executive machinery to control and guide a national administration of justice without danger, from that source at least, of a recurrence of totalitarian upheaval. At the end of the first year of occupation, the ministry had reached approximately one-third of its normal strength, based on standards existing prior to the annexation of Austria by Germany in March, 1938.

Indigenous Courts Under Military Government

The indigenous Courts of a strictly political nature in occupied enemy territory, such as the German Sonder- and Volksgerichte, have been abolished. All other indigenous courts were suspended pending reorganization, purging of personnel and functions, and reestablishment on sound bases.

When reestablished and permitted to reopen, priority was given to certain classes of litigation. Criminal cases take precedence over civil matters. First among criminal cases come those instituted since the occupation. Among civil cases, priority is required to be given to cases involving domestic relations.

The courts of the occupied country are prohibited from exercising jurisdiction over cases involving members of the armed forces or nationals of the countries of the occupying powers, cases arising under any law suspended by military government, money demands against the indigenous government or any agency thereof, and other categories of litigation specifically enumerated in military government legislation on that subject.

Functions of the Indigenous Courts

If the foregoing outline of the status of indigenous courts in occupied enemy territory does not suffice to show the extensive supervisory duties and responsibilities of military government legal officers in that regard, one needs glance only briefly at the sweeping powers exercised by such officers over those courts. Among those powers are the following: (1) To dismiss or suspend any judge, prosecutor or court official; (2) To attend the hearing of any case, even in closed session, and to have unrestricted access to all files and records; (3) To review all decisions of all trial and appellate courts, and to nullify, suspend, reverse or modify to any extent, any finding of any such court; (4) to transfer any case or class of cases to the jurisdiction of Military Government courts; and (5) to supervise and control the administration and budgets of all such courts.

Supervision and control of the indigenous courts was originally performed unilaterally, by legal officers in each zone. Control has gradually been relinquished to the national Ministry of Justice, with supervision continuing zonally, on a unilateral basis.

In addition, complete control over the Bar and notaries[5] is vested in the military government, exercised locally through its legal officers. No person is permitted to practise as lawyer or notary (nor as judge or prosecutor) without the consent of the military government, and until having taken an oath in the following form (United States Zone):

> I swear that I will at all times apply and administer the law without fear or favor, and with justice and equity to all persons of whatever creed, race or political opinion they may be; that I will obey the law in spirit as well as in letter, and that I will constantly endeavor to establish equal justice under the law for all persons.[6]

The military government is empowered specifically "to disbar from practice any lawyer or notary". And because these officials were, under the Nazi regime, formed into Nazi-controlled organizations, the latter were dissolved, and new local regional and national voluntary associations have been formed under the supervision of legal officers of the military government.

Military Courts of Occupying Forces

The law-enforcement machinery of the occupying forces, beyond direct military sanctions, consists of a system of military government courts. These are established by decree in the form of law or ordinance. Their proceedings are governed by promulgated Rules of Procedure, and these are supplemented by a Guide to Procedure prepared to assist officers conducting such tribunals.

These courts have jurisdiction over violations of the laws and usages of war, of military government en-

4. The action of the Council and Legal Directorate were at first required to be unanimous, and ultimate disagreements were rare. More recently, a new control agreement provided in effect that, in the absence of unanimous approval, legislation (other than constitutional provisions) was to become effective, on a presumption of approval, thirty-one days after submission to the Council. Strangely enough, disagreements have since become more frequent.

5. Notaries in continental Europe, as the Louisiana colleagues of the author will understand, occupy a quasi-judicial position of great importance in the commercial and professional life of their communities.

6. This is the oath prescribed for use in Austria. That being used in Germany, while not identical, is of substantially similar tenor.

actments and of laws of the occupied country itself. As to persons, they have jurisdiction as to all except members of the Allied forces, Prisoners of War and diplomatic agents.

The occupational commander may provide for such types of courts, and give them such jurisdiction, as he deems advisable. In the United States, French and British Zones of the European Theater, there are three kinds of these courts, Summary, Intermediate and General. Summary Courts are composed of one officer and may impose fines up to $1000 or imprisonment up to one year. Intermediate courts are composed of one or more officers, and may fine up to $10,000 or imprison up to ten years. General courts are composed of three or more officers, and may impose any punishment including death.[7]

Additional Functions of Military Government Courts

In addition to the foregoing powers, all military government courts may enter orders prohibiting an accused from entering or leaving a designated area, or ordering him to enter or leave it; for the forfeiture, restitution or disposal of property, premises or businesses; impounding money or other objects; requiring and forfeiting bail; punishing for contempt; and they have all "such other powers as may be necessary and appropriate for the due administration of justice".

Summary courts act as committing magistrates. They may themselves try cases, or refer them for trial to such higher court as, under the circumstances disclosed, seems to have adequate punishing power in the event of a finding of guilty. Or, the appointing authority may refer a case directly to an Intermediate or General court for trial.

Courts may be appointed by commanders of certain units, with the appointing power largely decentralized in non-operational areas. Courts are composed of Allied officers,[8] but prosecutors and defense counsel may be of any rank, or even civilians. There is no right of appeal, but decisions are subject to review, and the reviewing authority may set aside a finding of guilty; affirm, suspend, reduce, commute or modify any sentence; order a new trial; and "make such other order as may be appropriate", except that the reviewing authority may not set aside a finding of not guilty.

At first, in Sicily and Italy, it was attempted to follow, largely, Anglo-Saxon procedure, in order to implant the germ of that wholesome system on the continent. This was found, however, to be insufficiently effective for use against enemy subjects, who took advantage of its seeming technicalities, delays and presumptions in favor of the accused. A quick, decisive process was found necessary to meet the paramount demands of military necessity; and a summary continental system has now been adopted in the European theater.

The court has studied the record of the case before it is brought on for trial. It commences by stating to the accused a resumé of the case to be presented against him, and by interrogating him with regard thereto. It then proceeds with proof of only such matters as are controverted.

The only real rule of evidence in military government courts is that of relevancy. Hearsay, by way of example, is expressly admissible, but is to be given only such weight as circumstances justify. Evidence of bad character is admissible only after the accused has put his own character in issue. Neither husband nor wife nor parent nor child may be compelled to testify against the other; and the privileges of attorney and client, and priest and confessor, are recognized.

Military government courts may adopt a flexible procedure for the trial of juvenile offenders "based on the accepted practices of local juvenile courts" and those of England and the United States.

Finally, it is provided in the Rules of Procedure:

> The proceedings shall not be invalidated, nor any findings nor the sentence disapproved, for any error or omission, technical or otherwise, occurring in such proceedings, unless in the opinion of the Reviewing Authority, after an examination of the entire record, it shall appear that the error or omission has resulted in injustice to the accused.

Military government legal officers are responsible for the establishment, staffing, operation and supervision of military government courts. They prepare cases, prosecute them, sit as members of such courts, act as defense counsel in the most serious cases and prepare recommendations for the reviewing and confirming authorities.

Legal Advice to Military Government

Of course, legal officers are chargeable with responsibility, in the last analysis, for all legal phases of military government. Legal questions are involved, directly or indirectly, in practically every detail of military government activity. These questions vary from such relative trivialities as to whether an Allied officer need return the salute of a prisoner of war, to such vast problems as the legality, under international law, of the Moscow Declaration of November 1, 1943, providing for separation of Austria from Germany and her recreation as a free and independent nation.[9]

One of the most interesting of such questions involved the title to captured or abandoned enemy property. The point has frequently arisen. The French, for example, contended that any such property of French

(Continued on page 208)

7. Death sentences must be confirmed by the commander of the occupying forces or by such officer as he may designate.

8. Demobilization following cessation of hostilities has gradually necessitated the use of civilians as members of military government courts.

9. See, for instance, "A Study of the Legality of the Annexation of Austria by Germany under International Law and Austrian Constitutional Law, and the Policy of the United States toward Annexation", by Herbert Wright, Professor of International Law, the Catholic University of America. The study was reprinted as House Document No. 477, 78th Congress, 2nd. Session, 1944. A similar study by Professor Hans Velsen of the Department of Political Science of the University of California at Berkeley, reaches diametrically opposite conclusions.

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Courts of France:

Their Re-Dedication to Justice and Liberty

by William T. Hornaday • Lt. Col., G.S.C., of the Bar

■ Lieutenant Colonel Hornaday has written a stirring story of his participation as an American lawyer who happened to be on the scene, in a dramatic ceremonial—the post-liberation re-dedication of the French Courts to the sacred cause of liberty and justice. American lawyers who have felt that they have experienced hardships and dislocations because of World War II will do well to read this narrative of what befell their brethren of the Bar of France. At the critical time when that country is struggling to restore constitutional government and the rule of law, and the issue hangs in the balance, the events described by our contributor are heartening.

■ As a representative of Major General "Wild Bill" Donovan's Office of Strategic Services, I entered Paris in a jeep on August 25 in 1944, and saw the last of the fighting in the garden of the Chambre des Députés.

My first job was to locate our foremost agent in the city, who can still be known only as "Major Armand", obviously a *nom de guerre*. I had the addresses of all the "hides" which he had listed at SFHQ by radio to which he would go if things got hot. One of them was the apartment home of M. Pierre Leroy, 30 Avenue Wilson, XVIeme Arrondissement. This was the third place I contacted. When I rang the bell, a suspicious and frightened "bonne" answered, who would give no information except that it was the residence of M. Leroy, and was not interested in my explanation that I was "Un-American", and "Un Ami".

I finally advised that I would return, and actually did so later in the day, when I found M. Leroy's son, Bernard, a young man in his early twenties, who spoke school-taught English just a little worse than I spoke French. Between us, we managed to get along very well, however.

When I explained who I was and what I wanted, he was extremely pleased, informed me that his parents were having dinner at the home of one of the French Senators across the river, and suggested we go there at once.

The locating of Major Armand two days later, after his thrilling escape from a terrible fight with German forces east of Paris, is not a part of this story. Suffice it to say that German Panzer forces attacked the Major's force, which was armed only with small arms, slaughtered most of them, and burned over fifty prisoners alive.

WILLIAM T. HORNADAY

A Ceremony At the Palace of Justice

However, it turned out that M. Leroy was mayor of the XIIeme Arrondissement, and a lawyer. He was extremely pleased to have as his first American contact after the liberation of the city an American lawyer. That evening, he told me that, on Monday, there would be a small ceremony at "Le Palais de Justice" which he wanted me to attend.

So I took enough time off my work that afternoon to pick up M. Leroy and Bernard in the jeep, and

"jeep them" to the palace. There, after a struggle with the mob and the gendarmes at the gate, we finally got through, and into the ancient and dignified building. M. Leroy took me into a corridor outside some of the main court rooms, and introduced me to the President of the Court, already dressed in his beautiful scarlet robe and wig, and to other members of the Bar, all in their black robes and wigs. He excused himself to put on his own official dress, and with my own abominable French, and Bernard's aid, I answered many questions about the American Bar, and evaded answering many more about my work in the war. All were overjoyed at the saving of the city, and especially that it was done with so little damage, and still more that General LeClerc's forces had been permitted to be the first to enter.

An American Lawyer Was There

I was dressed in battle clothes, was filthy dirty from traveling many miles in a jeep fighting convoys on dusty roads, was wearing a side arm and carrying a helmet. Thus it was that I was horrified when the procession was formed to move into the courtroom, and M. Leroy told me I was to take place behind the President of the Court. I protested that I had come as a spectator, but nothing would do except that an American lawyer, part of the liberating force of their city and of their country, should take part. There was nothing to do but accept.

I still had not the faintest idea what the occasion was about. The procession moved through several rooms, filled with hushed crowds, with only a lane for the procession left open, into a large court room. Here, at one side, there was a small platform, on which stood another robed and bewigged member of the Paris Bar, and beside him a veiled monument of some type.

The procession, which had been a column of twos, took place, one file on each side of a corridor in the crowd, the President closest to the platform. Across from me, a British major, in war-time dress uniform, was led to a position in the line on the far side of the corridor. I learned afterward that he was a member of the English Bar, and had been found to represent the Bar of his country.

The President made a few brief remarks, most of which I could not understand, as he spoke rapidly, and then presented the other lawyer on the platform. This man, whose name, to my regret, I never learned, started speaking in slow, measured words, so clearly enunciated and so slowly spoken that I had no difficulty understanding him. He described with tense emotion, but without the slightest histrionics, how the French Courts had by force been prostituted and controlled by the Nazi tyrants during the occupation; how justice had been prevented and destroyed; how the freedom for which the French people had battled so desperately in 1789 and many times thereafter had been taken from them, and how they had despaired of ever casting off the iron control of the Nazi masters.

He described with great pride how the spirit of independence of the members of the French Bar had lived; yes, and of the great sacrifices that many members had made to support and maintain the hope for the future and to torment and destroy Nazis and to weaken their grip and prepare for the day when the forces of freedom and democracy should return from across the Channel and drive out the Germans.

With great emotion, but with the same iron self-control, he began reading the names of the many members of the Bar who had lost their lives as members of "La Resistance", the great French Underground. It was a long list. He seemed to go on and on. The suspense and strain in the room was like a physical pressure. At long last he read the final name.

Re-dedication of the French Courts

And then, for the first time, I learned what the purpose of the assemblage was. For after a pause he pronounced the culmination of the efforts of those who had so sacrificed. He rededicated the French Courts to the cause of freedom and justice. And with this, he unveiled the statue, dedicated to the greatest and most priceless privileges of humanity.

There was no applause, no cheering. The people assembled there had suffered too much; their regained freedom was too new; the pause when he finished speaking was more like a prayer.

It was a great privilege to witness this spectacle. One of my proudest memories will always be that I represented the American Bar at the rededication of the French Courts to the cause of freedom and justice.

AMERICA WANTS PEACE WITH JUSTICE

"America wants peace, durable peace, peace with justice, peace which preserves human rights and fundamental freedoms. America is not interested in peace without justice, or peace without honor, or peace at any price. America will neither appease nor compromise with any aggressor, now or hereafter. Those who ignore this dedication to liberty and justice will do so at their peril."

—Senator Arthur D. Vandenberg, of Michigan

"Books for Lawyers"

JOURNEY THROUGH MY YEARS. *By James M. Cox. New York: Simon and Schuster. 1946. Price $4.50. Pages 447.*

When I was about half way through this autobiography of James M. Cox I told a friend, who is as familiar as anyone I know with the kind of books that appeal to lawyers, that I was thinking of reviewing it for this department. His reply was that he had glanced through the book and saw very little in it for lawyers as such. This is a dissenting opinion.

It is true that Mr. Cox is not a lawyer and that he never studied law. Few observers, however, have viewed the American scene from so many diverse and favorable viewpoints: Reporter, Congressional secretary, representative in Congress, three times Governor of a populous and pivotal State, candidate for the presidency, publisher of newspapers in Ohio, Georgia and Florida.

With this background he has written simply and clearly the forthright record of a useful life well lived, and without pontification has recorded his candid judgments on men and affairs. All of this he has lightened by amusing stories well told and by vivid descriptions of distinguished people he has known and of good companions who have been his in work and at play. Indeed, here is persuasive evidence of the truth of the dictum that an autobiography is what a biography ought to be.

One who had long admired the gallant courage with which Mr. Cox carried the banner that fell from the stricken hands of Woodrow Wilson closed this book with an entirely new conception of the many other qualities of the writer—of his wide experience, of his shrewd common sense, of his admirable poise, of his tested capacity for public service. These are not the author's but this reader's conclusions from a record that is devoid both of false modesty and of self-laudation.

One lawyer at least found in the story of the life of such a man not only much to enjoy but much to reflect upon. Many impatient criticisms have been voiced and written in recent years of "legalism" and "the lawyer's point of view." Has the Bar's former desire for disinterested public service been submerged by narrow professionalism? Mr. Cox, who is an unbiased judge, does not seem to think so. There is no carping at the profession. The nearest he comes to self-praise is to write that one who heard his exposition of a legislative measure thought that he was a lawyer. He has high regard for many lawyers among his friends and associates—highest of all for John W. Davis: "If the Almighty ever created a finer man than John W. Davis I never knew him. He possessed every quality of statesmanship. . . . Mr. Davis and I came to Congress on the same day. He captivated the members of both branches by his dignity of manner, his intellectual courage and the penetrative qualities of his mind. My opinion is that he would have given an able, liberal administration as President." (page 330)

In refreshing contrast with some other advanced liberals Mr. Cox not only thus judges a lawyer apart from his clients but expresses an opinion with which almost every lawyer who knows Mr. Davis well will agree.

More than fifty years ago Mr. Cox first went to Washington as secretary to a newly elected Ohio Congressman. His recollections go back to the days of L. Q. C. Lamar ("a mental giant"), of Richard Olney ("one of the leaders of the American Bar, of keenly incisive mind, ruggedly honest"), of William C. Whitney[1] ("the most briskly efficient of executives"), of John G. Carlisle ("the oaken-hearted Kentuckian" and able lawyer), of "Pitchfork" Ben Tillman ("never . . . . any doubt as to his sincerity and honesty").

Not every vignette of that earlier time is so bright-colored but all are discriminating, as are those Mr. Cox draws of his colleagues in the 61st and 62nd Congress, among them Champ Clark, "Uncle Joe" Cannon, James R. Mann, Victor Murdock, Ollie James, Oscar R. Underwood and many others.

The fact that Mr. Cox's estimates of these notables of whom one has only read so frequently coincides with one's long-held opinions of them inevitably if not logically engenders confidence in his judgments. This confidence is confirmed when one is still in accord with his characterizations of some he has known at least slightly, such as Billy Phelps, Pat Harrison, John Sharp Williams, LeRoy Percy, Frank Knox, Lady Astor and others.

I do not know to what extent Mr. Cox was a partisan when he was active in politics, but I do know that now, when he has no further desire for or expectation of office, he evinces admirable tolerance. It has remained for this fellow Ohioan to do full justice to the memory of Clement L. Vallandingham (pages 72-77).[2] Of Herbert Hoover he writes that "no man ever came to the presidency

1. There has always stuck in my mind the last sentence of an editorial that appeared in the old *Life* shortly after Whitney's death: "But in the end the wagon that should have been hitched to a star followed a race horse and he seemed content to have it so."

2. Vallandingham who was a brilliant lawyer died a dramatic death. He was counsel for the defendant in a murder case. His insistence was that the victim had accidentally killed himself. While Vallandingham was demonstrating with a loaded pistol how this could have happened, he mortally wounded himself.

with a higher purpose" (page 341). Harding he declares "was an honest man, and while the conduct of many close to him was reprehensible and even corrupt, his own official record was never tarnished with dishonor" (page 238). Although the picture of Harry M. Daugherty and "the Ohio gang" is pitiless in its recital of the damning facts, there is not a trace of vindictiveness.

Mr. Cox demonstrates a knowledge and understanding of the peculiar problems of the South which is not universal among those from other sections. This is no newly acquired attitude; even when seeking the suffrages of Ohio voters he was never tempted to anti-Southern demagogy.[3] Holding this view Mr. Cox frankly states his opposition to any attempt hastily to solve these problems by radical measures, many unsound in themselves and many others premature.

In both domestic and foreign affairs Mr. Cox is a disciple of Woodrow Wilson. "The great domestic achievements of the Wilson administration . . . . gave all believers in liberalism a sense that the goals of which they had dreamed were being gained" (page 190). The opposition of Henry Cabot Lodge and Theodore Roosevelt to the League of Nations Mr. Cox believes to have been based upon partisan and personal grounds. Both were unwilling for the Democratic party to gain the prestige that would come from success. Each harbored a grievance against Wilson: Lodge bitterly resented having been accused of falsification; Roosevelt blamed Wilson rather than General Pershing for the rejection of his application for an overseas command.

Although Mr. Cox attempts no sensational revelations he does provide some material for the future historian. Notably he challenges the accepted version of the nomination of Franklin D. Roosevelt for the vice-presidency and throws new light upon the severance of some famous political friendships: Those of Wilson and Colonel House, of Wilson and Joseph P. Tumulty, of Franklin D. Roosevelt and James A. Farley.

Mr. Cox's story of his life has another lasting value. He has told in readable form the experience of a liberal Governor of a great State. While Lord Bryce, Justice Oliver Wendell Holmes and others familiar with our form of federalism have stressed the opportunity it affords for using separate States as laboratories for experiments in government, the tendency has been to push forward the frontiers by the use of the National power. One reason perhaps is that most chronicles, no matter how veracious, of the reforms initiated in any one State, are dull reading for those living beyond the borders.

I find myself so generally in agreement with Mr. Cox that there comes to mind the saying that a speaker is successful when he gives back to his auditors in shower the thoughts that he has received from them in mist. This autobiography does not quite do that, however. It is, for example, possible thoroughly to endorse his depreciation of Eugene Talmadge without fully sharing his enthusiasm for Governor Arnall. Moreover, there is at least a hint of extravagant language at one point—when he is boosting Florida; that, however, is an old Spanish custom, inaugurated, as I recall, by Ponce de Leon.

WALTER P. ARMSTRONG

Memphis, Tennessee

3. Believing that the picture "The Birth of a Nation" was educational, when Governor he lifted the ban that had been placed against it in Ohio for political reasons.

UNITED NATIONS ATOMIC ENERGY COMMISSION: *First Report of the Commission to the Security Council. December 28, 1946. New York: Lake Success, Long Island. Released in mimeographed form by the Commission. Pages 89.*

This momentous report came before the members of the Commission at its tenth meeting, on December 30. At 3:35 P. M. Mr. Baruch moved that the report be adopted. The record recites: "Ten members replied 'yes'. The U.S.S.R. and Poland abstained."

Excitement and controversy over the so-called "veto" issue have obscured the true nature of this report and the significance of the action.

It is a first report, an interim report; its recommendations deal mainly with scientific, technological, and managerial aspects of control. Except as to the "veto", it raises no political issues. It does not attempt to define the structure or power of the international control authority (page 58). It contains no draft for the contemplated international treaty. It reserves "many important questions to be further studied by the Commission". (page 16)[1].

The weight of the present report comes from the fact, too often overlooked as I see it, that the Security Council and The United Nations Atomic Energy Commission are made up of representatives of the same governments, except that Canada was added to the Commission because of the relation of its Prime Minister

1. A preliminary statement of some fundamentals, not always understood by the public in their correlation and perspective, may add to the usefulness of this review. The General Assembly could and did create The United Nations Atomic Energy Commission and direct what this Commission should study and report, but the Assembly has no powers to pass laws for the control of atomic energy. As to the materials and components of atomic energy, the plants and "stockpiles" in the United States, the Congress could and did pass a law which created the United States Atomic Energy Commission, and gave it broad powers, but only within the United States. This body is to be distinguished from The United Nations Commission.

Under the Charter and the declared policy of the United States and other principal Powers, world laws for the control of the uses of atomic energy and an international authority for the supervision, inspection, control and use of atomic energy, can be brought into being only through multilateral treaties or conventions developed and agreed on by the Security Council and The United Nations Commission, and ratified by the member Nations according to their respective constitutional processes. If such a treaty is formulated and submitted, and then is ratified by the Senate of the United States, the international authority will then have as to this country such powers and duties in the international sphere as are conferred on it by the treaty. A body of world law and an agency to watch out for incipient or threatened violations will then have been brought into being. Under the Charter, enforcement measures, the prevention of violations, will require action by the Security Council. Unless the ratifying Nations provide and bind themselves otherwise in the treaty, the Charter provisions as to unanimity of action would be applicable. The American position, as stated by Mr. Baruch, Senator Vandenberg, and others, has been that no Nation which has agreed to and ratified the treaty should be left with power to "veto" enforcement measures against violations, by itself or by any other country.

to the tripartite genesis. On January 1, as delegates of Belgium, Columbia and Syria had been elected to the Security Council, representatives of those countries took the places of Egypt, Mexico and the Netherlands on the Commission. Mr. Baruch having resigned and been succeeded by Senator Austin as the American spokesman, the representation of the Nations (except for the inclusion of Canada) in the two bodies became identical.

This is, therefore, a report by the Security Council (plus Canada) to the Security Council.

In all respects except as to the requirement for unanimity of action, this report proceeds on the firm bases laid down by the Acheson-Lilienthal report to our Department of State (reviewed in 32 A.B.A.J. 337) and by the Commission's own Scientific and Technical Committee (reviewed in 32 A.B.A.J. 761).

The Resolution adopted by the General Assembly of The United Nations on January 24, 1946, voiced the hopes of the whole world that atomic warfare can be avoided and that atomic energy can be harnessed for peaceful, beneficial purposes. It asked the Atomic Energy Commission if that were possible.

The Commission's reply is a categorical affirmative. It holds that "scientifically, technically and practically, it is feasible:

(a) To extend among all Nations the exchange of basic scientific information on atomic energy for peaceful ends;

(b) To control atomic energy to the extent necessary to insure its use only for peaceful purposes;

(c) To accomplish the elimination from national armaments of atomic weapons; and

(d) To provide effective safeguards by way of inspection and other means to protect complying states against the hazards of violation and evasions". (page 22).

The world *can* have the benefits, and avoid the evils, resulting from the discovery of atomic energy *if* the Nation-states of the world are willing to bind themselves by a treaty creating an international authority and giving it defined and limited powers, and if each of them thereafter conforms to the agreed-on restrictions and obeys the collective authority.

Since The United Nations Organization has no present legislative power, the legal base must be a multipartite treaty or convention. But, as the Commission observes, "an international treaty or convention, if standing alone, would fail". (page 24)

The report makes no mandatory recommendations as to legal *ownership* of mines and processing plants, but it does insist that the international authority shall have *control and management.*

"Control as used in this report is a general term which includes any or all types of safeguards." (page 55) "Management means direct power and authority over day-by-day decisions governing the operations themselves as well as advisory responsibility for planning." (page 56)

That the emphasis is on control and management is illustrated by the following provisions (page 21):

"The international control agency should control the storage and shipment of uranium and thorium materials to the degree necessary for security purposes."

"The international control agency should itself store and itself handle all enriched or pure nuclear fuel in transit. This does not necessarily imply ownership either of the materials or of the transit or storage facilities, questions which have not yet been discussed."

The preliminary nature of the report is further illustrated in connection with seizure. That has always been the ugliest question. The international authority may, in law, control and manage a uranium mine, but what happens if the Nation within which the mine is situated seizes the mine illegally *vi et armis*?

The Commission's findings on this point are: "Problems relating to seizure have been considered thus far only in preliminary terms. The major questions of seizure are political rather than technical. It appears, however, that technical measures could reduce the military advantages and, therefore, the dangers of seizures." (page 22).

The matter of the American stand for an agreement to suspend the veto as to enforcement against a violator has been beclouded by a great deal of publicity and heated discussion and even by the inclusion of extraneous considerations. The public mind seems to me to be confused and to need wise and informing guidance by American lawyers.

It is not difficult to see how the confusion arises. It is said that the veto point is academic because in a showdown with a Nation secretly making atomic bombs, the other Nations will of necessity go to war at once or else seek appeasement, and that their course will depend upon the will of their peoples or their rulers and will not depend upon any absence of unanamity in action in the Security Council.

It is further said that the point is futile because the veto could halt action only by The United Nations Organization as such and that the Organization has as yet no military forces or power whatsoever.

Finally, it is said that since Russia will agree to everything except this veto point, it would be sound statesmanship not to press it for the time being, in order that a great deal of the framework can be nailed down by unanimous agreement.

These are practical arguments, but they have no relevance to any plan whereby The United Nations Organization proposes to control atomic energy *by law*. Might does not make right. A law is not just or unjust according to whether the police are strong or weak. The "statesmanship" argument must fail because a law subject to a veto by a violator, against its enforcement, would be a contradiction of terms. It would not be *law*.

The hope of the world lies in the progressive development of international law. As the conscience of mankind advances and world law develops, it cannot be stopped by a negative vote by any Nation. The

principles established at Nuremburg, reflecting the conscience of mankind, are not subject to any such negation. They are law. The decisions of the International Court of Justice are not subject to a requirement of unanimity. The Court's decisions are *law*.

There is a seeming inconsistency in the American position that will bedevil the issue unless it is faced frankly. At San Francisco, the United States was just as insistent as was Russia that the Charter provide for unanimity of action among the "Big Five" to prevent aggression. That is where the veto, as a legal right, comes from. At Lake Success, the United States insists that, within the area of atomic control, no Power shall be able by its vote to block enforcement of the agreed-on treaty.

I believe the issue comes down to this. Our people believe that the world is not yet ready for a world government, that the dangers are too great, and that the wise choice is to support The United Nations staunchly and to help it develop step by step away from unqualified national sovereignties if need be and toward a juridical world order based on law and fair play. Our people believe also that the dangers from the atomic bomb are so overwhelming that there is no choice except between life and death, and that the only chance for a survival of civilized living and peace of mind is through giving to an international authority full powers to control and manage atomic energy, including the legal power to override what would otherwise be the National "sovereignties" to the agreed-on respects and in this one field.

The text of the Commission's report, as adopted, seems to me to support this analysis. Note that there are two entirely different proposals concerning the "veto":

The first is that—

"No government shall possess any right of veto over the fulfillment by the authority of the obligations imposed upon it by the treaty, nor shall any government have the power, through any exercise of any right of veto or otherwise, to obstruct the course of control or inspection." (page 26)

It is believed that Russia accepts the foregoing provision. It means that if Russia (or the United States) signs a treaty creating an atomic authority and instructing the authority to do certain things, Russia (or the United States) cannot veto the exercise of the agreed-on powers when the authority acts as it was instructed to do. A treaty duly ratified by the American Senate is a law — for us, "the supreme law of the land". It would not cease to be a law merely because it could not be enforced. The German laws against murder were, for a decade, unenforceable against certain persons. Because a treaty is a law, it cannot be left open to a unilateral veto by an incipient violator. Up to this point there seems to be entire agreement.

The second proposal is—

"Serious violations of the treaty shall be reported immediately by the authority to the nations parties to the treaty, to the General Assembly and to the Security Council. Once the violations constituting international crimes have been defined and the measures of enforcement and punishment therefor agreed to in the treaty or convention, there shall be no legal right, by veto or otherwise, whereby a willful violator of the terms of the treaty or convention shall be protected from the consequences of violation of its terms."

This is the sticking point. The Russian contention is that this changes the entire basis, the agreements on which the Allied Nations came together to form The United Nations. As to the field of control of atomic energy, it unquestionably does. The San Francisco Conference had adjourned and the Charter signed, before the first atomic bombs fell on Japan.

Under the Charter, Russia (or any of the "Big Five") could veto any such enforcement measure when it came to a vote in the Security Council.

What, then, has Mr. Baruch been fighting for all year long?

I believe that our elder statesman has seen the situation clearly and has been insisting that his countrymen and the Commission face up to the true issue. The only hope to control the atom bomb is through law. Let a plan, rooted in law, be set up legally, through a multipartite treaty duly ratified. Then enforcement measures will require action by the Security Council. That will be possible only if a power to veto is not exercised by a Nation which has ratified the treaty. If we get that far, then we have set up a system of law. As to that system, any "veto" must be abolished forever. Only so can it be made a system deriving its authority from world *law*.

Mr. Baruch, I submit, is consistent. If our only hope is in law, then any system which is not rooted in law is bound to fail. Any so-called law, such as a provision for punishing anyone who steals uranium, is not law if a violator can "veto" its enforcement. It would be only a snare and a delusion. If we cannot have within The United Nations a system rooted in law, let us know it at the outset.

Such a realization would be terrible, but less so than it would be to lull the world into a false sense of security by going ahead blithely to erect a structure on a foundation so weak, so subject to individual negation by a violator, that it would be bound to collapse when violation was threatened.

This may well be the most crucial decision which Americans shall have to face in our lifetimes. The resignation of Mr. Baruch and Secretary Byrnes at least point the need for facing the issue. The Bar could not decide such an issue for the people, but it can help make the nature of the choice plain by making clear the nature and the essentials of world law on the subject.

In popular language, we sometimes carelessly say that The President of the United States can "veto" a law. He can not. Under the Constitution, a bill does not become a law until enacted by both branches of the Congress *and* signed by The President. If he refuses to sign or

vetoes the bill, it is not law. If the Congress passes it over his veto it becomes law. Being law, it is not subject to any "veto."

When the Supreme Court finds an Act of the Congress to be unconstitutional, the Court does not "veto" the law, it says the Act never was law and could not be law, because it was forbidden by the overriding law of the Constitution.

A decision of the Supreme Court is law. It can not be "vetoed" by The President or by the Congress. That is the nature of law. A statute can be amended or repealed only by another law.

In the present state of world opinion, the recommendations of The United Nations Atomic Energy Commission may fail. We shall then have to resort to diplomacy, power politics, alliances, armaments. Some or all of these expedients may work for a time, but neither singly nor in combination can they establish the reign of law.

A treaty can be recommended by the Security Council and the General Assembly, to provide for the creation of an international authority, define its duties and powers, prescribe punishments for violations, and explicitly abolish the "veto" power as to enforcement. If and when that treaty is ratified and adopted by sovereign Nations according to their respective constitutional processes, it will establish the reign of law over atomic energy.

From that time on, the law will be supreme. Any violator will be stripped of any possible legal pretext or defense. The violator, like the pirate, will be an international outlaw.

If The United Nations Organization can not or will not enforce the law even though the violator objects to its enforcement, we shall have failed; but we shall have done our best.

The law will still be the law. The violator instead of being a "legal violator" will still be an outlaw.

Around the law as a nucleus the conscience of mankind can adhere and grow strong. A law that appeals to the deepest emotions in men — their desire for justice and security — will not lack champions.

If storms and war clouds again approach, all Nations and their peoples will have to make up their minds. Any Nation bent on conquest would seek allies or satellites. Many motives would enter into the decisions of the peace-loving Nations which were threatened by a hostile alliance.

The straight line drawn by law might be the decisive factor. There could be no question as to the side of the line on which Nations ought to take their stand.

The law itself can be the focal and rallying point.

That is the hope of civilization.

REGINALD HEBER SMITH
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SOVIET LEGAL THEORY: ITS SOCIAL BACKGROUND AND DEVELOPMENT. *By Rudolph F. Schlesinger. New York: Oxford University Press. $5.00. Pages viii, 290.*

This volume is a welcome although belated guest. Here is a scholarly statement on the structure and workings of Soviet law—the first modern law of a society which is not based upon private ownership of the means of production—and of the extent to which law is possible in such a society.

Soviet legal theorists are on record to the effect that in every state short of Utopia, law and government must continue and that there are some advantages in having a system of law which has an element of independence and is not entirely subordinate to the immediate need of political expediencies.

Professor Schlesinger deals with the growth of the theoretical concepts which have accompanied and influenced the evolution of Socialist law and with the fundamental philosophy of Soviet jurisprudence within the framework of the growth of Soviet society. Accordingly, this is more nearly a sociological and economic treatise, rather than a book on law *per se*. This is a logical approach. Because in a country where law is regarded as an expression of social conditions and of social needs, it is natural that the concepts of law should likewise be sociological rather than legal. Therefore, Soviet concepts deal with law not as an isolated system of values and norms but as an agent in social life.

This positivist approach to law as the sum of the general rules of behavior enforced by the state, is in consonance with the current trends of thought of Soviet lawyers.

While some of the concepts discussed are theories evolved by lawyers for the purpose of the law, the greater number have been developed by politicians, sociologists, and economists. Some, indeed, have been evolved expressly to demonstrate the alleged obsolescence of law in a Soviet-type society. And most importantly, some concepts have not been elaborated explicitly but are implied in the actual working of Soviet legislation.

The author has not tried to describe the legal system of the USSR, he has merely attempted to present the fundamental social facts and theoretical concepts dominating its development. The individual law, like the Court case, serves simply as an illustration of those concepts put into practice.

American students of the Soviet phenomenon may wish to note that in Soviet law private property is always to be regarded as a social institution secondary to public property. Nevertheless, the method of administering public property is not that of centralized bureaucratic control. On the contrary, the Soviet legal system admits a large measure of decentralization and self-government in various undertakings. This is one of the basic reasons why the Government deemed it highly desirable to create "trusts" and other public corporations, each placed on a separate accounting basis. These "trusts" are endowed with power to regulate their own internal affairs, subject to the general requirements of the State Plan, and enter into legal relations with other such legal bodies for the purpose of carrying on its

tasks under the State Plan.

Accordingly, even under a totalitarian socialist system peculiarly characteristic of the USSR, such legal concepts as property, contract, and "trust", need not be outmoded. To be sure, the sphere of operations of these concepts is radically different from that in the United States. It is not clear from Professor Schlesinger's exposition whether the practice and translation of these social concepts into the framework of the Soviet society redound to the benefit of the individual citizens. Nor is it clear whether the institutions of the emergency period are in themselves remarkable achievements, and hence might serve as patterns for universal application.

Conversely, in discussing theories of Soviet criminal law, the author seems to feel at home. His conclusion is that Soviet criminal justice, while ruthless in all matters political, has been fairly humane to the ordinary offender.

It is to be regretted, however, that this is not a very readable book. This may be due to the fact that many passages were rendered into English from the German text, which, in turn, was based on a secondary reading of Russian legal literature. Likewise, the chapter on "Soviet Conceptions of International Law" is perhaps the weakest in the volume. On balance, *Soviet Legal Theory* is a valuable summary of relatively current Soviet legal thought.

CHARLES PRINCE
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THE TRADE-MARK ACT OF 1946: *Analyzed, Annotated and Explained. By Harry A. Toulmin, Jr. Cincinnati: The W. H. Anderson Company. December, 1946. $5. Pages x, 224.*

As the Lanham Trade-Mark Act (H.R. 1654) was approved on July 5, 1946, and is to become effective "one year from its enactment," members of the Bar are interested in the competent analysis and exposition of that measure, which was designed to bring into one statute all federal law on the subject and to repeal all prior laws to the extent of their inconsistency with the new Act. New rights are created; international commitments of the United States are implemented; and the trade-mark laws of this country are brought generally up to date.

Harry Toulmin, of the Ohio Bar, author of currently useful works on "Trade-Mark Profits and Protection" and "Trade Agreements and the Anti-Trust Laws", has annotated the new Act, section by section, and has put together a useful chapter of background material on the legislative history and bibliography. The annotations do not go as deeply as might be desired, into the decisional law and rulings, in the Courts and the Patent Office, often at variance. Nor does the author commit himself extensively as to specific constructions or as to what questions are to be regarded as still open under the new Act.

Despite these limitations, which may be inherent in expediting the exposition of a statute not yet in effect, Mr. Toulmin has produced a volume which will be welcome and helpful to those concerned with the law of trade-marks.

"Previews" of Books

ANTHOLOGIES OF IDEAS: The Gresham Press will publish shortly two volumes that are the first of a series to be published periodically. For February release is *American Thought 1947*, with contributions by Honorable Robert H. Jackson, Sidney Hook, Hanson W. Baldwin, and many others. *British Thought 1947* will be the second volume, scheduled for publication in the Spring. Among the many contributors are Norman Angell, Cyril Connolly, George Orwell, and Maxwell Fry.

DUAL BIOGRAPHY: The recent *New Yorker* profile of Howe and Hummel, colorful criminal lawyers, is being expanded by its author, Richard H. Rovere, and will be published by Farrar Straus in June.

OFFICIAL HISTORY: The official picture history of the Federal Bureau of Investigation, *The Story of the FBI*, has been prepared by the Editors of *Look* magazine, with an introduction by J. Edgar Hoover. It is scheduled for publication by E. P. Dutton & Co. on April 14. ($3.75)

FREEDOM OF THE PRESS: The University of Chicago will publish this spring several reports by the Commission on Freedom of the Press. The Commission was sponsored by Henry Luce and the Encyclopedia Britannica, although it owed no obligation to its sponsors, nor was it technically under the jurisdiction of the University. The general report of the Commission, *A Free and Responsible Press*, with a foreword by Chairman Robert M. Hutchins, is scheduled for release in February. Other forthcoming reports are: *Freedom of the Movies, The American Radio, The American Press and the San Francisco Conference, Government and Mass Communications*, and *Freedom of the Press*. Members of the Commission included Zechariah Chafee, Jr., professor of law at Harvard, vice-chairman, Beardsley Ruml, Archibald MacLeish, Arthur M. Schlesinger, Harold Lasswell, George N. Schuster, John Dickinson, William Ernest Hocking, John Clark, Reinhold Neibuhr, Charles Merriam, and Robert Redfield.

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Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Bankruptcy—Interest on Interest—Conflict of Laws

Vanston v. *Green, et al.*, 91 L. ed. Adv. Ops. 175; 67 Sup. Ct. Rep. 237; U. S. Law Week 4063 (Nos. 42-45, decided December 9, 1946).

December 2, 1930, a Kentucky District Court appointed an equity receiver of Inland Gas Corporation to take complete and exclusive control of its property, and enjoined Inland's officers from paying its debts. The indenture trustee, acting under the terms of indenture, declared the entire principal due and payable. In 1935 the same District Court approved a creditors' petition for reorganization under Section 77B of the Bankruptcy Act, and at a subsequent date the reorganization was continued as a Chapter X proceeding. The mortgage indenture, executed in New York, provided for payment of interest on unpaid interest.

It designated a New York corporation as trustee and made the bonds and coupons payable in New York or, at the option of the holder, in Chicago where the debtor had a paying agent. The property covered by the mortgage was located in Kentucky where the company had its principal place of business. The bonds were sold to the public in many states.

The District Court concluded that it must allow the claim for interest on interest if the indenture covenant was valid; that its validity must be determined by the law of New York because the indenture was signed and the bonds made payable there; and that the covenant was valid there. The Circuit Court of Appeals reversed on the ground that the contract for the payment of interest on interest was void under New York law; that the District Court controlled by the local law of Kentucky was bound to look to the law of New York to determine the validity of the covenant. The Securities and Exchange Commission, urged allowance of the claim if the covenant would apart from bankruptcy be upheld in the courts of any state having a substantial relationship to the transaction; that Delaware, the state of incorporation, and Kentucky, its principal place of business, and the site of the mortgaged property, authorized the payment of interest on interest, and that whether interest should be allowed was a matter of federal law to be fashioned by the bankruptcy court in the light of general equity policy in a bankruptcy administration.

Mr. Justice BLACK delivered the opinion of the Court.

He held that assuming that the obligations were valid under the law of New York, Kentucky and other states, the Court would still have to decide whether the allowance was compatible with the policy of the Bankruptcy Act.

He concludes that the general rule in bankruptcy and in equity receiverships has been that interest on the debtor's obligations ceases to accrue at the beginning of proceedings. Interest where the power of the debtor to pay is suspended by law, is prohibited on "equitable principles" because of delay in prompt payment, occasioned by the Court's action in taking charge, to preserve and protect the estate for the benefit of all interests involved.

In this case where by order of the Court interest was left unpaid, the allowance of interest on interest was not justified by an application of "equitable principles". The fact that the proceeding was moved from equity receivership, through 77 B, to Chapter X, does not render these equitable considerations inapplicable. The intervention of the equity receivership drastically changed the interrelated obligations of the parties and suspended the obligation to make prompt payment of simple interest coupons. No added compensation penalty should be enforced

* Assisted by James L. Homire; labor cases by E. J. Dimock, member of the Board of Editors.

for the failure to pay, where the obligation to pay has been legally suspended.

Mr. Justice FRANKFURTER, with whom Mr. Justice JACKSON and Mr. Justice BURTON concurred, held that this was not a case where damages are claimed in the form of interest for detention of moneys due and that the claim for interest on interest is based solely on the terms of an agreement, the validity of which is to be determined by the law of the place where it was made; that if the contract to pay interest was invalid by the law of New York (where the indenture and the bonds were executed and delivered) neither Kentucky, nor Delaware, nor the states in which the bonds were sold, or where bondholders reside, could give effect to an obligation which never came into being; that the determination of the Circuit Court of Appeals that a New York undertaking to pay interest was void, is conclusive, and that there was accordingly no obligation created on which could be based a claim provable in bankruptcy. They further declared that the constitutional provision requiring "uniform laws on the subject of bankruptcy" is satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration. They also declared that the requirement is simply one of geographic uniformity, and that the Constitution did not intend that transactions that have different legal consequences, because they took place in different states, shall come out with the same result because they pass through a bankruptcy court.

The case was argued by Mr. George W. Jaques and Mr. Robert J. Bulkley for Vanston; by Mr. Roger S. Foster for SEC; and by Mr. Charles I. Dawson and Mr. Jay Raymond Levinson for Green.

Criminal Law—Alien Registration Act of 1940—Conspiracy to Impede the Government in the Administration of That Act—Admissibility of "Overt Acts" of One Conspirator as Evidence Against Other Defendants —Satisfaction of Conviction by Serving the Sentence Does Not Necessarily Make the Case Moot. (St. Pierre v. United States, 319 U. S. 41, distinguished.)

Fiswick v. *United States,* 91 L. ed. Adv. Ops. 183; 67 Sup. Ct. Rep. 224; U. S. Law Week 4056 (No. 51, decided December 9, 1946).

Twenty-eight aliens were indicted on charges of "conspiring to defraud the United States in the exercise of its governmental functions" in violation of Section 37 of the Criminal Code. They were charged with conspiring to make false registrations under the Alien Registration Act and with conspiring to keep the fact of false registration secret. Only three of the defendants were convicted. The Circuit Court of Appeals, Third Circuit, affirmed the conviction and the Supreme Court granted certiorari and reversed.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The government contended that the confessions of each of the defendants were overt acts of a continuing conspiracy but the Court held that the confessions were not overt acts but that they terminated the conspiracy and that the admission of those confessions against all the defendants and the charge to the jury to the same effect was prejudicial error and not within the terms of the "harmless error" statute (28 USC 5391).

The final point dealt with the suggestion of the government that since Fiswick, one of the three defendants here, had served his prison term, the case as to him had become moot and the appeal should be dismissed. But Mr. Justice DOUGLAS points out that the "conviction which he suffered was not in accordance with law" and that Fiswick was entitled to have that judgment reversed in order to remove its effect if extradition proceedings or other pains and penalties were based upon it.

The case was argued by Mr. Frederic M. P. Pearse for Fiswick and by Mr. Leon Ulman for the United States.

Eminent Domain—Exercise of Federal Eminent Domain over Land Devoted by a State to Public Use—Parties—Trustor Who Conveys Land to State for Benefit of Its Inhabitants May Be Heard in Defense of the Trust

U. S. v. *Carmack,* 91 L. ed. Adv. Ops. 165; 67 Sup. Ct. Rep. 252; U. S. Law Week 4043 (No. 40, decided December 9, 1946).

This case deals with the right of the United States to exercise its power of eminent domain for the taking of public property already devoted to a public use by a state or municipality. It also deals with the right of Congress to delegate to Federal authorities the selection of the site for the taking in the exercise of their discretion.

The record shows the following facts. In 1807 the land in question was conveyed in trust to the "Commissioners of the District" and in 1820, in trust to "the inhabitants of the Town of Cape Girardeau". State and municipal authorities of Missouri devoted the property to use as a public park.

In 1941, pursuant to Acts of Congress, the United States filed a condemnation complaint for the taking of part of that land as a site for a post office and custom house. Notice was served on the city and on numerous officials and on all unknown owners and others who might claim an interest and especially those who might claim as heirs of those who conveyed to the City. A public referendum was held to determine the popular approval or disapproval of the plan. The vote was 1612 to 1344 in favor of the transfer. The public authorities were apparently satisfied with the result of the referendum and the plan of transfer. The only defendant who filed an answer was Iska W. Carmack. She defended on the ground that the United States could not take land which had been conveyed in trust for public purposes.

The district court held that she had no interest permitting her to maintain the defenses she asserted.

On appeal the Circuit Court of Appeals, Eighth Circuit, reversed and remanded the case to the district court holding that Mrs. Carmack "had a special interest entitling her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestors."

On retrial before a different district judge, it was held that under all the circumstances, the proposed taking was "capricious and arbitrary" and the petition was dismissed. The Circuit Court of Appeals, on the second appeal, held that the Postmaster General and the Federal Works Administrator lacked statutory authority to take the site, declined to rule on the question of whether the selection was "capricious and arbitrary", and dismissed the petition. Because of the importance of the construction of the statute authorizing the condemnation of land for federal use, the Supreme Court granted certiorari, and after hearing reversed the decision of the Circuit Court.

The opinion was delivered by Mr. Justice BURTON. The Court first approached the question of the authority of the Postmaster General and the Federal Works Administrator under the various Congressional Acts, to select the site and take the land and it is held that the authority that the discretion lodged in those officers was neither exceeded nor was sufficient for that purpose and abused.

The opinion then takes up the question of the right of the United States to exercise its right of eminent domain in regard to property already held by a state under a grant in trust for public purposes. Quoting from *Kohl* v. *United States*, it is said: "If the right to acquire property . . . may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen." Quoting from Mr. Justice Bradley's opinion in *Stockton* v. *Baltimore & New York Ry. Co.*, it is said: "The doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the government of the United States in all matters within the scope of its sovereignty . . . it must be received as a postulate of the Constitution that the Government of the United States is invested with full and complete power to execute and carry out its purposes."

Mr. Justice DOUGLAS concurred in the result.

The case was argued by Mr. John J. Cooney for the United States and by Mr. I. R. Kelso for Carmack.

Unemployment Compensation — Administrative Law—Existence of "Labor Dispute" Although Seasonal Employment Not Yet Begun—Unemployment "Due" to Labor Dispute Where Caused by Unwillingness to Pay Wages Sought — Impropriety of Substituting Court's View for Administrative Tribunal's and Deciding on Ground Not There Presented — Dispute "At" Alaska Where Involving Employment There.

Unemployment Compensation Commission of Alaska et al. v. *Aragan et al.* 91 L. ed. Adv. Ops. 143; 67 Sup. Ct. Rep. 245; U.S. Law Week 4071 (No. 25, decided December 9, 1946).

The proceeding was one to review a holding of the Alaska Unemployment Compensation Commission that respondent claimants were disqualified from receiving benefits for a period of eight weeks since their unemployment was "due to a labor dispute" which was "in active progress at the factory, establishment or other premises at which" they were "last employed", within the meaning of those terms as used in §5(d) of the Alaska Unemployment Compensation Law (Extracrdinary Session Laws of Alaska, 1937, Ch. 4, as amended by Ch. 1 and Ch. 51, L. 1939). The statute limited the period of disqualification to the first eight weeks. The statute is part of the legislative scheme induced by the provisions of the Social Security Act of 1935. (49 Stat. 620, 626, 627, 640). It is said that forty-three states and territories have provisions similar to those under consideration.

The examiner had held that the disqualification was effective to the end of the eight-week period. On appeal, the referee had held, on the contrary, that the labor dispute had ended at certain deadline dates fixed by the employers for consummating working agreements with the union and so was not "in active progress" thereafter. The determination had been affirmed on further appeal to the Commission. The United States District Court in turn affirmed the Commission but the Ninth Circuit Court of Appeals reversed on the ground that, since the negotiations between the employers and the union took place in the off season in the United States where the employees resided instead of in Alaska to which they had been transported for the previous operating season and where operations had then been conducted, the labor dispute was not "at" the premises where claimants were last employed. On certiorari the United States Supreme Court reversed, except as to the employees of the Alaska Salmon Company which, the Court held, omitted to resume operations for reasons other than a labor dispute.

The CHIEF JUSTICE delivered the unanimous opinion of the Court. He considers four principal questions: (1) whether at any time there was a "labor dispute" within the meaning of the statute; (2) whether the unemployment was "due" to a labor dispute; (3) whether the labor dispute was in "active progress" after the deadline dates; and (4) whether the labor dispute was "at" the premises where claimants were last employed.

On the first question the respondent claimants contended that, because the controversy preceded the seasonal

(Continued on page 208)

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■ *The House Meets Again*

Returning to its custom of a mid-winter convocation, the House of Delegates will meet at the Edgewater Beach Hotel in Chicago on February 24-26. The Board of Governors and various of the Section Councils and Association Committees will meet on February 22-23.

American lawyers will await with keen interest the outcome of the deliberations and votes in the representative body of the Association. In addition to the usual grist of calendared business, several matters of unusual importance to the profession and the public will be debated and decided.

Perhaps the most directly important will be the considered recommendations of the Association's new Committee on the Judiciary, as to its plans for securing the appointment and confirmation, to federal judicial offices, of men of high qualifications and tested impartiality and independence. Several controversial questions are also to be reported on by the Committee (see our December issue; pages 823-26). Opinion in the Committee and the House has not crystallized as to some of them.

The Committee for The United Nations is to submit its recommendation as to whether or not the Association should now take a stand against the Connally amendment of the Morse Resolution (S. Res. 196) for acceptance of the optional compulsory jurisdiction of the World Court. The Association's Assembly voted against the Connally Amendment in Atlantic City (December issue; pages 873-74). Opinion in the Committee and the House has been divided on this issue also.

The continuance of undivided, hearty support for The United Nations and the declared foreign policy of the United States, which were unanimously voted by the House in October (December issue; page 871), is likely to be brought again to the floor of the House, for re-affirmation in the light of the many developments.

Numerous other matters, some of them possibly controversial, may come on the calendar at these sessions. The work of the Association is expanding in many directions. The plans for cooperation with the Canadian Bar Association as to the progressive development of international law will be reported on by the Committee for United Nations. The plans for the projected survey of the legal profession will be given definitive form. Proposals as to labor relations law may be provocative.

The House is a delegate body, representative of many angles of the profession of law. Basically, it represents and speaks for its own members and for the members of the organized Bar, at home in the States. The State is the unit of representation. The views of the members throughout the country, on controversial subjects, should be made known to the members of the House, in advance of such a meeting. A list of the members of the House was in our September issue (page 597); there are few changes. If you wish your views expressed, write the members from your State, at their home offices; or write or telegraph them at the meeting.

■ *Impartiality Is Essential*

A great deal of interest has already been aroused, among members of the profession and in the Congress as well, by the publication, on page 1 of our January issue, of the fact that some 350 Hearing Examiners under the Administrative Procedure Act are to be selected by June of this year.

No less than in the filling of such few vacancies as arise from time to time in the Courts of the United States, it is of first importance to the administration of justice that the men selected to fill this large number of quasi-judicial posts shall be qualified by experience and temperament, shall be of tested impartiality and independence, shall be factual-minded and open-minded, and shall be free from preconceptions and political motivations or ideologies, which might create bias in their discharge of their duties.

A paramount issue as to the preservation of the American ideal of justice under law is *insistence on impartiality* on the part of all judicial and quasi-judicial officers. This is the core of the distinction between the American system and the Soviet concept of judicial bodies. As Mr. Justice Jackson cogently pointed out in Atlantic City (see page 87 of our January issue), the Soviet concept is that Courts are "government organs of vengeance"—at least, for the carrying out of the predeterminations of the governmental policy-makers, irrespective of the facts as to the individuals involved.

Underlying much of the controversy in this country as to the arbitration of labor disputes, the establishment of labor courts, etc., is the fact that too many labor organizations have become accustomed to accomplishing the selection of arbitrators, fact-finding boards, and the like, who are biased in their favor or partial toward their claims. The essential for the setting up of tribunals to hear and determine labor disputes fairly is that the method of selecting their members shall be such as to assure competence, special qualifications, immunity from political or group pressures, and, above all, impartiality and freedom from bias in favor of any special interest.

The arbitrator or "fact-finding" board politically chosen for the exigencies of a particular claim by a numerous body of voters is likely to be partial and biased in that case. Members of Labor Courts, for example, *could* be appointed and confirmed on a basis which would assure *their* special qualifications and their freedom from group interest and ideological bias.

The urgent need is the devising of methods of appointment and confirmation which will assure that Hearing Examiners and like quasi-judicial officers shall be in reality impartial.

■ *Twenty-five Years of the Court*

The January issue of the invaluable *Journal* of the American Society of International Law signalizes in an appropriate fashion an event which the lawyers of North America hail as a significant mile-stone.

Its leading article is "Twenty-five Years of the World Court". Each year for a quarter of a century Manley O. Hudson has written, and the *Journal* of this distinguished American Society has published, an authoritative review and commentary as to the events of the preceding year, as to the great international tribunal of law and justice whose seat is at The Hague. This is Judge Hudson's twenty-fifth article in the series; its exposition and its documentation are highly informative and will be useful to all who keep themselves informed as to the history and progress of the World Court.

To President Guerrero and his colleagues in the Court, we extend the greetings and the best wishes of American lawyers, upon the attainment of this significant maturity. To the *Journal* of the Society we extend felicitations upon its appropriate commemoration of the turning of the quarter-century mark in the long struggle to supplant force and power with international adjudication under law. Members of the Canadian and American Bar Associations will at this time recall with satisfaction the effectiveness of their joint efforts for the World Court and its Statute, in the Committee of Jurists and the San Francisco Conference, in April through June of 1945.

The future place and part of the World Court in bringing about a law-governed world have not yet won full acceptance. Disputes which belong in the Court are still withheld for provocative discussions at the political level. But the Court is established and ready to function. It has achieved twenty-five years of history and usefulness as the world's foremost judicial institution. With the militant support of the lawyers in all lands which prefer law and peace to aggression, infiltration and insecurity, there are abundant grounds for confidence that the enlightened moral judgment of mankind will bring all liberty-loving Nations to ungrudging acceptance of the judicial process as the best method of settling international legal disputes.

■ *Justice in Lawyers' Offices*

In discussing the many-sided participation of lawyers in the administration of justice ("Why the Profession of Law?"—December issue, pages 861-62), we pointed out that a great deal of the "administration of justice" never comes to Court at all, but takes place "around the table in conference rooms, usually in lawyers' offices", and that for poor and needy persons especially, but for many others also, "their final 'Court' is usually in a conference room with lawyers, or they have none at all".

Now comes Mr. Justice Robert H. Jackson of the Supreme Court, in his concurring opinion on January 13 in *Hickman* v. *Taylor*. Discussing the interpretation to be put on the "discovery" rule, he said, with Mr. Justice Frankfurter joining:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

We suggest that every member of the profession of law will do well to read carefully and in full the opinion of Mr. Justice Murphy for the Court in that case, and the concurring opinion of Mr. Justice Jackson. The portrayal of their concepts of modern trial practice and the lawyer's role is illuminating.

■ *Amended Rules of Civil Procedure*

Issues which are disturbing to lawyers and their clients often work out acceptably, if the organized profession is vigilant in doing its part. Instance of this is afforded by what has taken place as to the amendments of the Rules of Civil Procedure for the District Courts of the United States.

The distinguished Advisory Committee had been long and carefully at work on many amendments which experience has shown to be needed to improve and clarify the Rules. One of the subjects considered was naturally the protection to be afforded, and the limited access to be given, as to adversary files in connection with pending suits. Judicial decisions had been so vari-

ant that explicit definition and limitation by an amendment of Rule 30 seemed to be desirable.

The Advisory Committee, after long consideration, developed and submitted a proposed amendment. By some lawyers, this formulation was construed as likely to have effects contrary to the stated intentions of the majority in the Advisory Committee.

At this stage, a District Court in an admiralty case *(Hickman* v. *Taylor)* in Pennsylvania rendered a decision which gave to the "discovery" practice an interpretation that opened a lawyer's files very broadly to adversary access. The Circuit Court of Appeals for the Third Circuit reversed the Court below, and the case was taken to the Supreme Court.

The American Bar Association filed a brief *amicus curiae* (32 A.B.A.J. 882-83), in support of the decision of the Circuit Court of Appeals. This brief was sharply criticized by some (32 A.B.A.J. 864). The proposed amendment was spiritedly debated in the "open forum" of the Assembly in Atlantic City. The Assembly and the House of Delegates voted their opposition to the amendment in the form in which it had been filed.

In what did all this eventuate? As reported elsewhere in this issue, the Supreme Court on December 27 approved many amendments of the Rules, but deferred action on the amendment in controversy. The Supreme Court on January 13 unanimously affirmed the Circuit Court of Appeals in the *Hickman* case. The Advisory Committee will continue its labors to perfect amendments on the three matters reserved by the Court. The Association's Committee on Jurisprudence and Law Reform, under the authorization voted by the House of Delegates, will do what it can to assist in the formulation of an amendment which will be satisfactory to lawyers throughout the country.

■ Secretary of State James F. Byrnes

With the grateful appreciation of his profession and his country for duty well performed, James F. Byrnes has laid down the burdens of the office of Secretary of State and will return to the practice of law, taking first a needed and well-earned rest from his labors.

After a useful career in the Senate of the United States, on the Supreme Court, and as the chieftain of industrial mobilization and stabilization during the war years, this North Carolina lawyer became Secretary of State, at a time which was probably the most difficult and critical in our country's history. Others than he had set precedents for courses of action which called him often from Washington to European capitals for long conferences and most trying negotiations, and made difficult the needed reorganizations and the development of a comprehensive foreign policy, through conferences in Washington.

Despite the many obstacles and discouragements, Judge Byrnes stuck to his many tasks and gave to them all of his skills, his amiability, his persistence, and his deep devotion to the American sense of fair play. During last November and December, he and his associates at last made headway. The first five Peace Treaties came from the travail; international cooperation began gradually to work, through grudging concessions.

Above all, the pattern of a correlated American policy, broad and lasting in its bases, began to emerge, with bi-partisan support. The Byrnes-Vandenberg-Connally-Dulles-Baruch "team" had hammered out that policy on the firing-line.

Mr. Byrnes' prodigious labors took their toll of his health and strength. His patriotic services as Secretary of State will be long remembered by his countrymen, and none will question his right to put his burdens down and conserve his life. The public service of this lawyer is by no means ended; he can rest with a consciousness of duty well performed against great odds.

To General George C. Marshall who succeeded him on January 21, Americans will give the same wholehearted support irrespective of party, with high hopes that this able organizer of victory in war may be the architect of a lasting peace with justice under law. His forthright declaration that he conceives the office of Secretary of State to be "non-political" and that he "cannot be drafted" or considered for any other public office, was a firm foundation for prestige and public confidence in his administration of the office, from the start.

■ The Life Tenure of Federal Judges

At the turn of the year, David Lawrence, well-known columnist, submitted in many newspapers his contribution to the current discussion of remedies for the conditions which he depicted as giving rise to criticisms of the federal judiciary. He proposed that the life tenure of federal judges be modified by constitutional amendment.

Mr. Lawrence started with what we believe to be a false assumption. He said: "Life tenure for federal judges and particularly for members of the Supreme Court of the United States has resulted in a recklessness and an irresponsibility which calls for constitutional change." Experience has shown, we think, that the primary cause of the conditions which Mr. Lawrence deplores (ill-considered and uncertain decisions, the remote effects of which are not yet understood) has been the appointment to the bench of men who were not properly experienced and trained for judicial work and who lack the independence, the impartiality, and the fidelity to the judicial function, which are indispensable.

A secondary cause has been the Senate's abdication of its constitutional function in the confirmation of judges. Through senatorial courtesy, party loyalty, group pressures, and general apathy, the Senate has too often failed to "hold the line" against the inexperienced and the temperamentally unfit, and thus has not performed the function which the Founding Fathers expected of it. Happily, there are indications that this abdication may be ended or suspended.

Limitation of tenure would not correct the abuses which Mr. Lawrence laments. His proposal is like the recommendation of a doctor that, instead of excluding infected and harmful food from the system, it be taken, and that an emetic be resorted to periodically. He recommends that incompetent judges be excluded after ten years. Why not after five years? Why not after one year? Would it not be best of all to exclude them before they take office?

The high water mark of advance in the institutions of free government in the republican form is the concept of a detached and independent judiciary of secure tenure. There is no other way by which disputed issues can be subjected to impersonal and impartial decision. The story of its accomplishment has not yet been sufficiently told, and the public generally has not yet come to an understanding of the complete virtue of that system. Powerful groups and insistent individuals are still too willful and arbitrary to entrust their controversies to the rational judgment of an impartial tribunal according to due process of law.

Contrary to Mr. Lawrence's implications, the effect of security of tenure has often been, in course of time, to make fairly good judges of inexperienced and mediocre appointees. It tends to give them a feeling that they need no longer be dependent on the party machine or the pressure group which raised them to the bench. Their independence grows as their sense of gratitude wanes; discharge of the judicial function tends eventually to inculcate a sense of justice and fair play, and a preference for certainty in the rules of decision.

Of course, no such process of judge-making after appointment is automatic or certain. The system works best when men of judicial temperament and high character and broad experience are selected for judicial office and given security of tenure.

■ *"All Men Are Created Equal"?*

Almost every American schoolboy can repeat Lincoln's immortal lines:

> Fourscore and seven years ago, our fathers brought forth on this continent a new Nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

This month we shall often hear again Lincoln's classic words. He took frequent opportunity to repeat this first of the "self-evident" truths proclaimed by our Declaration of Independence. What did the words, "all men are created equal", mean to him? To the lawyers in Philadelphia on July 4, 1776? What should they mean to Americans today?

John Locke, physician son of an English country lawyer, made a deep impression on early Americans with his views on political philosophy. He imbued early American lawyers with the conception that democracy is a spirit, compatible with a variety of institutions, rather than merely a form of government.

Locke's second *Treatise of Government* was described by Sir Frederick Pollock as: ". . . probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession." In it Locke said:

> Though I have said above (2) "That all men by nature are equal," I cannot be supposed to understand all sorts of "equality." Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom Nature, gratitude, or other respects, may have made it due; and yet all this consists with the equality which all men are in in respect of jurisdiction or dominion one over another, which was the equality I there spoke of as proper to the business in hand, being that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man.

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Members of the Advisory Board are consulted from time to time by the Board of Editors as to policies and problems of the *Journal*. They obtain, or suggest, and will at times prepare, desirable material for publication, particularly from their respective regions. Except for the monthly editorial contributed and signed by a member of the Advisory Board, none of its members is responsible, individually or collectively, for the contents of the *Journal*.

Lincoln was quick to recognize that there is a myriad of ways in which it is "self-evident" that men are *not* created equal. He said:

> I do not understand the Declaration of Independence to mean that all men were created equal in all respects. . . . But I believe that it does mean to declare that all men are equal in some respects; they are equal in their right to life, liberty, and the pursuit of happiness.

The great virtue of our American concept of liberty under law is that, unlike such finalities which describe themselves as Communism, Fascism or Naziism, it does *not* try to press men into a mold preconceived by the state. Democracy is not an end; it is a means, a process, a procedure by which each man, naturally a dynamic being, can enjoy his life and liberty, and pursue the things which bring *him* happiness. A republican form of government under a written Constitution is the assurance of those inherent rights.

Louis D. Brandeis sounded much like Lincoln when he urged:

> Nobody ought to be absolute; everybody ought to be protected from arbitrariness and wrong decisions by the representations of others who are being affected.

It is the eternal glory of American lawyers that it is their responsibility, their privilege, to fight absolutism in *every* form—arbitrary power in government or in the private hands of groups. Before the law in America "all men are created equal".

■ *Increase in Association Dues?*

Without anticipating the action of the House of Delegates on February 24-26, it seems to be inevitable that it will consider an increase in the amount of Association dues. The costs of salaries, wages, equipment, printing, materials, etc., for Headquarters operation have increased greatly since the dues were fixed at $8.00 in 1928. The cost of printing the JOURNAL and other publications has followed the increase in the costs of labor, paper, ink and other materials.

The work of the Association has grown greatly in volume, scope and importance. As to the Courts of this country, the administrative agencies, the maintenance of high standards of legal education, the progressive development of international law, and in various other fields, there are many things more than there formerly were, which the Association does, and needs to do, for the profession and the public. The projects for which we are called cannot be permitted to bog down or fail. "Bigger dues for bigger duties", was the way Lane Summers, of Seattle, put it, in persuading the Washington State Bar to increase substantially its dues.

An increase in dues to cope with the increased costs and the widened work may be decided on by the House, as the rational course to follow if the Association is to fulfill its increased responsibilities. If the Association "does its job", that will be worth a commensurate amount of annual dues.

Editorial From a Member of Our ADVISORY BOARD

■ *The Transcript of the Nuremberg Trial*

Last Spring one of the members of our Association—a constant reader of this JOURNAL, he bids us add—took it into his head that he wanted to read the transcript of the Nuremberg trials; and somewhat naively, he now admits, he started to write to the Government Printing Office for a copy of the transcript of the hearings to date. Then he thought it might be harder than that to get, and he wrote to a friend in Washington who would know how to get it and have it sent to him. It turned out much harder. For his friend made inquiries and reported that there was only one official transcript of the hearings in this country, but that our member would be welcomed at the War Department if he came down to Washington to read it, and would indeed be allowed to copy any part of it he wished. However, he was assured that arrangements had been made to print the whole record, "from soup to nuts," at the Government Printing Office, and that it would come out during the summer. He was content to wait.

But he started thinking, and first he wondered why it was the Army and not his Department of Justice which was handling his legal business. For after all, it was *legal* business, and it certainly was *his* business. But he knew the War Department had engaged competent counsel for him and, to be sure, the trial was being held in occupied territory. However, he was going to get his copy of the transcript as soon as the whole of it could be printed, and he sat back content until then to read other things, including, as he prompted us to add, this JOURNAL.

The first we heard of all this was just now, when the publication of the trial started to come out in print. There are now four volumes out, and four more to come, but with them has also appeared a prospectus, in which there is a rather full table of contents. Our friend is going to be disappointed. So far as appears from this table of contents., no transcript of the oral testimony is going to be included. The indictment, motions, the opening by the prosecution, a summary of the case for the prosecution, and volume after volume of the exhibits introduced by the prosecution, are being printed. But apparently none of the testimony, and none of the cross-examinations.

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Why not? What a record! We had a notion, too, that we should like to read the cross-examination of the defendants who took the stand. We had an idea that their own words would best show their guilt. Why can't we lawyers read the cross-examination of Goering? He was the chief defendant, not only by his own account but also as it appeared in the eyes of the prosecution. Yet none of it, apparently, is to be included in any of these eight volumes. Is it not to be published? Are we lawyers never to be able to read Goering's cross-examination unless we make a trip to Washington and spend a day or so in the War Department? For we, too, want to know what the chief defendant had to say for himself, which of his dirty doings he was forced to admit, and particularly which he boasted of, for that would be the prime proof of the depth of his guilt.

We sympathize with our member, reader, and friend. We, too, should like to read the testimony and the cross-examination of the defendants. We, too, were clients in this case. As lawyers we know we owe our clients the duty to provide them, if they wish, with a transcript of the testimony of the cases we have tried for them. Now that we are the clients, we claim the same privilege. It does not seem to us too much to ask of our attorneys.

But we have a better reason than that for wanting the whole transcript published. Cooley wisely observed:

> The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself.

We all know the shortcomings of reports of trials in the public press. This case at Nuremberg has been no exception. How full and how adequate the reports may have been which reached the editorial offices, what the papers found space for was all too short and, from all we know of newspaper reports of trials, may very well have been misleading. It is not enough that the hearings were open to the public by way of the press. We are not only curious, as our friend was.

The Bar, it has always seemed to us, has a special function, a special duty, to explain legal proceedings to the public. For we lawyers are its experts in legal matters. Put us, their experts, in possession of the full facts —and nothing short of the full transcript will suffice—so that through us if not directly, the trial may be given that full publicity which the law favors for legal proceedings.

CHARLES P. CURTIS, JR.

Boston, Massachusetts

Editors to Readers

■ As our Association, under the over-all direction of its Committee for Peace and Law through United Nations, is about to mobilize on a broad scale the judgment and the skills of the organized profession throughout the country in behalf of the project of The United Nations to further the progressive development of international law and its eventual statement or codification, the JOURNAL proposes to assist in the Association's task by publishing from month to month one of the significant documentary formulations which are being developed under the auspices of that Committee. The first of these publications will be in our March number. Members of the profession who wish to keep abreast of the developments and issues in international law will find these analyses informative and useful. The same material will be supplied to the distinguished Committee headed by Chief Justice E. K. Williams of Winnipeg, Manitoba, for its adaptation for contemporaneous use in the Canadian Bar Association's activities in the cooperative efforts to which the two Associations have pledged themselves anew.

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During disconsolate moments due to printing delays, uncertainties as to paper supply, and the difficulties which a Board of Editors made up of busy lawyers encounter in producing a satisfactory JOURNAL under present conditions, your Editor turned for cheer and guidance to one of his favorite compilations – the thousands of "comments" which individual members of our Association so kindly and helpfully wrote, in connection with their responses to our Questionnaire last fall. Here is a never-failing mine of constructive criticisms and pithy suggestions, along with some mead of encouragement. The following caught the eye by chance: A lawyer in Maryland wrote concerning the usefulness of the items brought together each month as an uncompensated contribution to the JOURNAL, by a dozen or more lawyers who are engrossed in their own work for clients, to constitute our "Practising Lawyer's Guide" to the current law reviews and periodicals. Here is what he said:

> I believe in giving credit where it is due. It may be of interest to your staff that we recently won a large case solely upon the law and authorities that we secured from a notation in this section of the JOURNAL, which gave a review of an annotation from the *Nebraska Law Review* on the subject of aviation clauses in life insurance policies where the insured was killed in military action.

This was not the first instance in which lawyers have told us, for the most part orally, of the assistance they have received in their professional work, from law review articles brought to their attention by our diversified department.

We had known, of course, of an appellee's attorney who in a case of first impression in the field of administrative law in the Supreme Court of the United States, had opened his argument by stating clearly and concisely his basic contention and had supported it with such analogies in decisional law and such statutory interpretations as seemed to him to be in point. Then in closing, he referred again to the basic contention with which he had opened, and said that its phrasing had been in the exact language of the conclusion arrived at by the writer of a "note" in the *Harvard Law Review*, in discussing the opinion of the Circuit Court of Appeals in the instant case. He asked the Court to make a record of the citation to the review article, published after the briefs in the case had been submitted, then read to the smiling members of the Court the concluding paragraph of the "note" and sat down. P. S. The decision was unanimously in his favor, through an opinion by Chief Justice Stone.

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Our printer has eked out for this issue more of paper supply than we expected. The augmented quantity has been pre-empted largely by the Proceedings of the Assembly and House at the 1946 Annual Meeting, the publication of which had been deferred until we could have the space. Meanwhile, our pages continue to be filled almost wholly with articles and news material which it seems to be urgent to publish in the particular issue. A wealth of submitted articles which we would *like* to publish, and would be of much interest to our readers, is held indefinitely in abeyance. To the many contributors of accepted articles thus deferred, without definite assurance as to time of publication, we can only express our appreciation of their patience, and our hope that the "log-jam" of priority material may soon be broken. We look forward to making up an issue with articles which we would *like* to publish, instead of mostly with material which is mandatory for the particular issue.

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The first American publication of the full, official and correct text of the voluminous Judgment of the International Military Tribunal at Nuremberg, as to the guilt of the Nazi war criminals, is in the January issue of the *Journal* of the American Society of International Law, which is due from its printers late in February. Along with this awaited document are two authoritative articles which discuss the Judgment from sharply different points of view. That by George A. Finch, of the Division of International Law of the Carnegie Endowment, is critical in some respects; it is an amplification of his address at our Atlantic City meeting. The article by Professor Quincy Wright, of the University of Chicago and our Department of State, is altogether laudatory, as to the trial, the Judgment, and the impacts on international law. Especially in view of the editorial contributed to this issue by Charles P. Curtis, Jr., of our Advisory Board, we suggest that lawyers who wish to have an informed opinion as to the Judgment will do well to obtain and read it and these two articles. The War Department's official publication of the Judgment is not expected before autumn.

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The editorial in our December issue (pages 865-66), "What Goes On In Your Community", seems to have stirred up a lot of hornet's nests, in many parts of the country. It has led to a number of animated "Letters to the Editors", which report incidents as having taken place in various communities. Because each is essentially local in the events depicted, and some of them might involve injustice to sincere individuals outside the profession, we do not find space for these communications in our columns. Our purpose, after all, was to suggest the vigilance and the participation of patriotic lawyers in local forums of public discussion — not at all to disparage or discourage untrammelled debates on all manner of topics, or the free expression of all sorts of views, in such forums. We sought mostly to bring it about that members of the profession will see to it that the tested considerations underlying the maintenance of a republican form of federal government under our written Constitutions, as well as the basic principles of the developed "bi-partisan" foreign policy of our country, shall be capably explained and fairly considered in all communities.

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Iowa is a large State, and many of its lawyers have to travel considerable distances, to go to the State capital. Such trips in mid-December are not especially comfortable. Nevertheless, when the Iowa State Bar Association opened its Seventh Annual Tax School, in Des Moines, on December 12-14, more than a third of the Association's membership attended, as reported on page 179 in this issue. This was revealing as to the place and part which income and estate taxation has come to have in the average lawyer's practice. Adapting its curriculum to the needs of many of the State's lawyers, the School gave especial emphasis to the tax law problems which arise in practice in farm areas. When a State Bar Association puts on a program which meets the practical daily needs of its members, it takes more than winter weather to keep them away.

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Because of the difficulties, delays and costs which printing projects encounter in our print-shops, as well as the current pressures on the Headquarters staff in making the changes in progress as to equipment and methods, we have not proceeded with the reprinting of any of Ben W. Palmer's notable articles. The project has been postponed, not necessarily abandoned; many requests for reprints were received. Meanwhile, "Defense Against Leviathan", from our issue for last June, has been reprinted by some who believe that it should be widely circulated, in support of the principles which it enunciated. We understand that copies can be ar-

ranged for through George B. Peluso of our membership, whose office is in the Tower Building, Syracuse, New York.

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In the Senate of the United States on January 13, Chairman Alexander Wiley of the Committee on the Judiciary did a gracious act as to his predecessor, Senator Pat McCarran, of Nevada, and in so doing placed before the Senate a most timely and informative document. In asking that Senator McCarran's address before our Association in Atlantic City be reprinted from the JOURNAL (32 A.B.A.J. 827) and made a part of the *Congressional Record*, as was done at pages A111-14, Chairman Wiley declared that: "One of the most important subjects facing the Eightieth Congress is the straightening out of the relationships between federal agencies and our citizenry in order to make certain that the hirelings of the federal government work in the capacity of servants rather than masters of our people. The relationship between the agencies and the Courts will also merit much attention by us in the future as it has in the past. A noteworthy step along this line was the passage by the Seventy-ninth Congress of the Administrative Procedure Act, with which my colleagues are familiar. Nevertheless, many questions are arising from day to day over the operation of that Act; questions such as relate to the evidence receivable at agency hearings, the lawful bases of agency decision, the limitations on agency discretion, the plenary scope of judicial review of 'legal wrongs' through agency action or inaction, the powers and duties of the Courts to review agency decisions and grant relief, and so forth. It is essential to the correct functioning of this Act that our citizenry have a clear idea about these and other questions."

An International Penal Code Is Favored

■ Before the adjournment of its recent sessions, the General Assembly of The United Nations adopted on December 10 a Resolution in affirmation of what it describes as "the principles recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal," and directing their embodiment in an International Penal Code.

This action dealt with a subject already under consideration as a part of the plans of the Association's Committee for Peace and Law Through United Nations, in connection with "the progressive development of international law and its codification."

The Report and Resolution in The United Nations Assembly were as follows:

1. The General Assembly, at its forty-sixth plenary meeting on 31 October 1946 referred to the Sixth Committee the question of the implementation by the General Assembly of its obligation "to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law". The Sixth Committee referred the matter to a Sub-Committee, which had also before it, a Resolution proposed by the delegation of the United States relating to the principles of international law recognized by the Charter of the Nuremberg Tribunal (document A/C.6/69).
2. The majority of the sub-Committee agreed, not only that a Committee should be appointed to consider the proper methods of implementing the obligation of the General Assembly under Article 13, paragraph 1, subparagraph a. of the Charter, but that that Committee should give priority to plans for the formulation of the principles of the Charter of the Nuremberg Tribunal, and of the judgment of that Tribunal, in the context of a general codification of offences against the peace and security of mankind or of an International Criminal Code. The Sub-Committee felt that this view was strengthened by the fact that similar principles had been adopted in respect of the trials of the major war criminals in the Far East.
3. The Sub-Committee's report (document A/C.6/116) presented by its Rapporteur, Mr. E. R. Hopkins (Canada), was adopted by the Sixth Committee which therefore recommends to the General Assembly the adoption of the following resolution:

AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NUREMBERG TRIBUNAL

THE GENERAL ASSEMBLY,

RECOGNIZES the obligation laid upon it by Article 13, paragraph 1, subparagraph a. of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; and

TAKES NOTE of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946.

THEREFORE

AFFIRMS the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

DIRECTS the Committee on the codification of international law established by the resolution of the General Assembly on December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Chapter of the Nuremberg Tribunal and in the judgment of the Tribunal.

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Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Labor Law. . National Labor Relations Act. . right of a union member to participate in election activities for a rival union without threat of discharge under a closed shop agreement obligating the employer to employ only members in good standing.

■ The Ninth United States Circuit Court of Appeals, on November 22, 1946, granted enforcement of the National Labor Relations Board's order in the case of *Local No. 2880, Lumber & Sawmill Workers Union, A.F.L.* v. *N.L.R.B.* The Board had found the Portland Lumber Mills guilty of violating §8 (1) and §8 (3) of the National Labor Relations Act in discharging an employee who was a member of Local No. 2880 which had a closed shop agreement with the company providing that the union would be sole judge of its membership. The only reason for the company's dismissal was a demand by Local No. 2880 and the basis of the demand was the employee's participation as an observer for a rival C.I.O. union during an election for bargaining agent. The Court upheld the Board's construction of §8 (3) (which recognizes the right of an employer to make an agreement with a labor organization that membership in the organization will be required as a condition of employment) with relation to §7 (which grants to employees the right to bargain collectively through representatives of their own choosing) as not warranting a discharge for activities at an election for such choice. The Court stated that if they are to exercise the right under §7 "in terrorem of discharge, because its exercise may displease the union successful at the election, that 'labor organization' would be 'assisted by . . . action defined in . . . [Subsection 8 (1)] as an unfair labor practice' in violation of the express language of the proviso." The Court said that the decision of the Board in no way detracted from the benefits Congress conceived in enacting the closed shop proviso but that it prevented the use of the proviso for the perpetuation of a particular union's control of the employees once it entered into a closed shop contract.

On December 28, 1946, a petition by the union for a rehearing on the stated ground that the Court apprehended "some doubt about the economic propriety of the closed shop contract in the lumber industry" was denied as unwarrantable.

Civil Service. . Administrative Law. . right of Government to remove an employee where loyalty is doubted. . conclusiveness of administrative finding.

■ In the case of *Friedman* v. *Schwellenbach,* decided on December 16, 1946, the District of Columbia Court of Appeals affirmed the District Court judgment upholding the discharge of a Government employee which had been based upon a determination of the Civil Service Commission that there was reasonable doubt as to his loyalty. The appellant had been transferred from a government position not under the classified Civil Service to a position requiring Civil Service status. The transfer was made pursuant to War Service Regulations of the Civil Service Commission adopted pursuant to Executive Order issued by virtue of authority conferred by the Civil Service Act. They provided for conditional employments and conditional transfers so that an employee could be put to work at once during the wartime emergency but was still subject to a subsequent character investigation. The determination of reasonable doubt as to loyalty was made as a result of such an investigation. The Regulations further provided that an employee might be removed on that ground. The Court in upholding the action of the Commission reaffirmed the right of the Government to prescribe the qualifications of its employees and to remove an employee where there was a reasonable doubt as to his loyalty whether or not the employee was in fact disloyal. The Court stated that the action of the Commission was no more than the performance of an ordinary duty of an executive agency and that its finding was conclusive.

Libel and Slander . . Constitutional Law. . court of equity lacks jurisdiction to enjoin libelous publication. . right of free speech.

■ In the case of *Montgomery Ward & Co.* v. *United Retail, Wholesale & Department Store Employees of America, C.I.O.,* decided November 30, 1946, the Illinois First District Appellate Court, in an opinion by Burke, J., reversed a lower court judgment granting an injunction to restrain the union from publishing and conspiring to publish libelous statements concerning the company. The union elected to stand upon its motion to dismiss the complaint as insufficient. The Court ruled that this constituted an admission that the statements attributed to the union were untrue. The decision adhered to the doctrine that a court of chancery has no jurisdiction to restrain by injunction the publication of a libel, and held that, since conspiracy is not the gravamen of an action, the allegation of conspiracy

did not result in obviating the application of the rule. A previous opinion of the Court was quoted to the effect that the difficulties grow alike out of constitutional provisions for free speech and want of jurisdiction in the court of equity.

Labor Law . . Constitutional Law . . § 506 of Federal Communications Act . . "Anti-Petrillo Act" held unconstitutional . . right of union to picket peacefully . . right of employee to cease or refuse to work.

■ On December 2, 1946, the United States District Court for the Northern District of Illinois, in an opinion by La Buy, J., declared unconstitutional §506 of the Federal Communications Act of 1934, as amended, known as the Lea or the "Anti-Petrillo" Act. The Court paraphrased the statute as prohibiting the willful use of our threat to use pressure to compel a licensed operator of a radio station to employ persons in excess of the number actually needed. Defendant was charged with violating the Act by causing musicians to discontinue their employment, by causing musicians to refuse employment, and by causing the picketing of plaintiff's place of business. The statute was held to violate the requirement of the Fifth Amendment that a criminal offense be defined with definiteness and certainty in that no standard or guide was provided by which the number of employees needed could be ascertained; to violate the First Amendment's guaranty of freedom of speech since the imposition of liability only in the case where the employer was coerced prohibited the publicizing of a labor dispute by peaceful picketing; to violate the Thirteenth Amendment by its restrictions upon the freedom to refuse or to discontinue employment either individually or through a group organization; and to violate the equal protection clause of the Fifth Amendment by arbitrarily distinguishing broadcasting station employers and employees from employers and employees in other communication industries.

Labor Law . . right of the Government while operating mines to change terms and conditions of employment . . legality of representation of supervisors and rank and file by single union.

■ On December 16, 1946, the District of Columbia Court of Appeals, in the case of *Jones & Laughlin Steel Corporation* v. *United Mine Workers of America,* upheld the authority of the Government in its capacity as operator of mines to enter into agreements with unions establishing changes in the terms and conditions of employment. The mine owners sought an injunction against recognition of an agreement between the Coal Mines Administration and the supervisors division of District 50, United Mine Workers. This agreement recognized the union as the exclusive bargaining representative of the supervisors during the period of Government possession. The Court, in an opinion by Clark J., decided that the Government had followed the procedure provided in §5 of the War Labor Disputes Act for securing changes in terms or conditions of employment in seized mines and held that the fact that there had been no proceedings before the National Labor Relations Board did not prohibit the Government from recognizing the union, since the owners, when in possession of the mines, could have done so and the Government stood on equal footing during its period of operation. The Court rejected the contention that, under existing case law, a single union in a hazardous industry could not lawfully act as exclusive representative of both rank and file employees on the one hand and their supervisors on the other. It stated that, even though the enforcement of safety laws was the responsibility of supervisors under state law, membership in the same union with the rank and file would not interfere with such enforcement.

Labor Law . . exclusive bargaining agent . . duration of unlimited agreement by it that individual employees might deal individually with employer.

■ The National Labor Relations Board, on December 19, 1946, affirmed the rulings of the Trial Examiner in the matter of *J. I. Case Company* v. *Local 180,* and ordered the company to bargain with the union as the exclusive representative of all employees in the appropriate unit. In spite of the fact that the union, as the choice of a majority of the employees was, under §9(a) of the National Labor Relations Act, the exclusive representative of the employees, the company had refused to bargain with respect to such matters as the closed shop and the check-off on the strength of a letter of February 6, 1937, in which the union had recognized the "unquestioned right of any employee" to join or refrain from joining a union and the right of "any individual employee not a member of Local 180 to deal individually with the Company". The Board did not pass upon the original validity of the agreement but held that no effect could be given it after such a long period of time since to do so would be contrary to the policy of the National Labor Relations Act. The contention of the company that, irrespective of the letter, reservation to non-union members of the right to bargain individually was proper under the U. S. Supreme Court decision in *J. I. Case* v. *N.L.R.B.,* (321 U. S. 322) was repudiated. The Board interpreted the case as holding that individual bargaining is proper in those aspects of the employment relationship not covered by collective bargaining agreements, but is subordinate to the collective bargaining rights of the statutory representative.

Libel and Slander . . immunity of the judiciary from liability for defamatory statements.

■ The New York Appellate Division, First Department, on December 13, 1946, in the case of *Salomon* v. *Mahoney,* granted a motion to dismiss a complaint in which the

plaintiff, an attorney, charged the defendant, a City Magistrate, with slander in making certain defamatory statements about him including the statement that he had solicited clients in the court house corridor. When the words were spoken the court was in session and the magistrate on the bench was endeavoring to procure before the court proper attendance of persons after he had been obliged to suspend for fifteen minutes because of their prior non-attendance in the courtroom and loitering in the corridor. It was found that the defamatory remarks were not charges against the plaintiff and in addition the Court affirmed the immunity of judges for statements made and acts done in their judicial capacity, even when they are defamatory, and the right of the judiciary to preserve order and prevent interruptions of the court's proceedings through non-attendance.

Labor Law . . Fair Labor Standards Act . . "portal to portal pay" for sleeping time. . independent contractor making munitions for Government as engaged in production of goods for commerce. . agreements as to what constitutes work not governed by rule that contracts violating purpose of Act will be held ineffective. . circumstances of case determine whether time is compensable.

■ The Seventh United States Circuit Court of Appeals, in an opinion in *Bell* v. *Porter*, handed down December 10, 1946, held that firemen, who agreed to sleep on the premises and to be available for duty during their sleeping periods in consideration of their employment, were not compensable for the time so spent. *Anderson* v. *Mt. Clemens Pottery Co.* (328 U.S. ——, decided June 10, 1946) was distinguished. The Court upheld the District Court's ruling that the production of goods by a government independent contractor for interstate transportation to destinations fixed by the Government was production for commerce within the meaning of the Fair Labor Standards Act and rejected claims that the employers were protected by sovereign immunity and by the fact that the commerce involved was not "commercial or business commerce." The Court therefore held that the firemen, their employees, fell within the Act, but it reversed the lower court's decision which had granted the firemen a large sum under the Act for sleeping periods spent on the premises.

The Court relied as to the first point, on *Bowers* v. *Remington Rand Inc.*, decided by it on the same day. There firemen contended that the contract of employment in which they agreed to spend their sleeping time on the premises conflicted with the intent of the Fair Labor Standards Act to spread employment and that the agreement circumvented and evaded §7 of the Act with respect to overtime by substituting for a three-shift system the two-platoon system. The Court stated that contracts of employment which violated the provisions or purposes of the Act would not be given effect but held that such a rule did not apply to an agreement to settle the question of whether certain activity or non-activity constituted work or employment. A statement of the lower court was approved to the effect that the question of compensable time depends upon the circumstances of the case and the mere fact that the employee was in some small degree deprived of some freedom of action does not determine it.

"THE POOR MAN'S LAWYER"

"In 1876 [two years before the formation of the American Bar Association] an organization was founded in New York City whose like was not known in this country. It was the Legal Aid Society, and the purpose as stated in its constitution was 'to render legal aid gratuitously, if necessary, to all who may appear worthy thereof, and who are unable to procure assistance elsewhere, and to promote measures for their protection.' So real was the need for such a society that more than 1,500,000 persons have received its help in seventy-one years, and there are now 137 organizations similar to it throughout the country. In 1946 an average of 113 persons each day came to the society's offices seeking counsel and help; 41,251 cases were handled in the year, 7,000 more than in 1945, and one of the heaviest loads in the history of the organization. Among those helped were 6,859 veterans involved in civil cases. A staff of twenty-four attorneys and twenty-four clerical assistants and investigators stood ready to help the poor man who was unable to pay a lawyer.

"Under this increasing case load the Legal Aid Society naturally needs more money. It is now seeking $200,000 for a year's operating expenses, about $30,000 more than was asked last year. The legal profession itself has always carried a disproportionate share of the society's budget. For example, in 1945 the average cost of handling each case was $4.88. Of this amount the client himself paid 29 cents in registration fees and commissions; $2.20 came from lawyers in the form of donations, $1.17 from foundations, including 43 cents from the Greater New York Fund, and only $1.22 came from the public at large.

"The man or woman without funds who needs a lawyer has a trusted friend to turn to in the Legal Aid Society. The aftermath of war presents a variety of problems, including home evictions and domestic difficulties, in which bewildered people —sometimes in trouble through no fault of their own — need sound counsel."

—Editorial in the *New York Times* on January 23, 1947

Lawyers *in the News*

Fritz G. LANHAM

■ With the shift in party control in the National House of Representatives, it is fitting to note in this department the substantial public service rendered by a Texas lawyer who has moved over to the minority side, the historic Committee on Patents having also been abolished by the Reorganization Act of 1946. This lawyer nevertheless left as the landmark and hall-mark of his workmanship the Lanham Trade-mark Act of 1946, which was enacted last July under his leadership and goes into effect on July, 1947.

LANHAM was born in Weatherford, Texas, in 1880. He attended Weatherford College, Vanderbilt University, and the University of Texas, in which he also studied law. He has practised law in Fort Worth, Texas, since 1917, and has been a member of the 67th to the 80th Congresses (1919-1947). In the House of Representatives he has pursued an independent course, and in consequence has been marked for political extinction, by "left-wing" elements in his party. His constituents have nevertheless re-elected him.

The Lanham Trade-mark Act brings into one statute all federal laws relating to the subject, creates new rights as to registration and protection, implements the United States' international commitments in that field through American membership in the International Union for the Protection of Industrial Property, and brings our law of this subject generally up to date. Already the new Act is dealt with in books and law review articles, some of which are reviewed elsewhere in this issue.

Maurice Edward BATHURST

■ A hard-working and skillful British lawyer who has made many friends in the profession in America and has attended several meetings of the American Bar Association, including the recent meeting at Atlantic City, is MAURICE E. BATHURST, who is serving his country and the cause of The United Nations in many capacities and always does a first-rate job of law work.

At present he is the legal adviser to the United Kingdom representative on the Security Council and is the representative of the United Kingdom on the Council's Committee of Experts (Legal) and on the Legal Committee of The United Nations Atomic Energy Commission. In addition and among other things, he is the Counsellor and Legal Adviser of the British Embassy in Washington.

BATHURST was born in England on December 2, 1913, and was educated at the University of London, from which he obtained his LL.B. degree in 1937. He also did post-graduate work in Cambridge, completing residence and research requirements for a Ph.D. in law, and held a University of London post-graduate studentship. Later he was awarded the degree of Master of Law from Columbia University.

He began his legal career in articles of clerkship with Cameron, Kemm & Co., Solicitors at Lloyd's Bank, Ltd., in London. He was admitted as Solicitor of the Supreme Court in 1937, and was a part-time partner in the firm of E. S. Baynes & Co., London, from 1937 to 1939. At the same time he served as Supervisor of Law at Gonville and Caius, St. John's, Jesus, and Corpus Christi Colleges, Cambridge, and as External Examiner at the Law Society's School of Law. He was a Tutorial Fellow at the University of Chicago Law School in 1939, and a Special Fellow at the Columbia University School of Law in 1940.

In the following year BATHURST became the assistant specialist and administrative assistant in the British Press Service. When it was merged into the British Information Services, he became legal adviser, communications officer, then special assistant, to the Deputy Director-General (1941-42). He served as legal adviser to the North American offices of the British Broadcasting Corporation from 1942 to 1944, when he was appointed Second Secretary of the British Embassy in Washington. While in that post, he also acted as secretary and general and legal adviser to Harold Butler, representative of the British Ministry of Information. In 1943, he became the legal adviser to all the departments of the United Kingdom Embassy.

In December of 1944, he was promoted to First Secretary, and also served as Honorary Legal Adviser to the United Nations Information Office and the Food and Agriculture Organization. In January of 1946, he was named Counsellor and Legal Adviser to the British Embassy in Washington.

BATHURST has drafted interna-

tional treaties, and was a member of the United Kingdom Delegations to UNRRA, to the San Francisco Conference, to the Washington Financial and Economic Talks, and the Bermuda Civil Aviation Conference. He has written extensively on subjects of law in British and American journals, and has assisted in editing Key and Elphinstone's *Conveyancing Precedents* (14th Ed.) and Dicey's *Law of the Constitution* (9th Ed.).

During intervals in his useful and busy life at Lake Success and in New York City and Washington, he talks hopefully of the day when he can return to the practice of law in London. Meanwhile, he has worked closely with leaders in our Association as to projects and proposals in the field of international law and The United Nations.

Bourke Blakemore
HICKENLOOPER

■ An Iowa lawyer has moved into a "key" place in the Senate of the United States and in American policy, through the majority selection of Senator HICKENLOOPER as the Chairman of the Senate-House Committee on Atomic Energy. He is regarded as a staunch supporter of the Byrnes-Baruch-Vandenberg "no veto" plan for control through The United Nations, as well as a likely "brake" on any "collectivist" tendencies in the Lilienthal Atomic Energy Commission created by the United States. HICKENLOOPER ranked third among the members of his party on the joint committee formerly headed by Senator McMahon, of Connecticut.

He was born in Blockton, Iowa, in 1896, and attended Iowa State College, and the University of Iowa. From the latter he won a J.D. degree in 1922. It has been reported that during his student days he was the room-mate of Judge Frederic M. Miller, of the House of Delegates, who resigned last fall from the Supreme Court of Iowa. During World War I he was a second Lieutenant in the Field Artillery of the AEF.

Admitted to the Iowa Bar in 1922, HICKENLOOPER has practised law continually in Cedar Rapids, except as politics and public affairs called him elsewhere. He served in the Iowa legislature, was Lieutenant-Governor for four years (1939-43), then Governor (1943-44). He has been a member of the American Bar Association since 1943. In 1945 he became Senator from Iowa.

As a rugged and experienced lawyer, his rapid rise to place and power in the Senate, early in his first term, marks him as a strong "up-and-coming" member of the new Middle Western leadership in foreign and domestic policy.

Benjamin F.
BOYER

■ The new Dean of the School of Law of Temple University, in Philadelphia, is BENJAMIN F. BOYER, who has been a member of the Law Faculty at the University of Kansas City, Missouri, since 1937 and its Dean since 1940. Dean BOYER took his new post at Temple on February 1. At the University of Kansas City, he was succeeded as Dean by Rudolph Heitz, of the Missouri Bar.

A graduate of the College of Arts and Sciences of the University of Missouri, BOYER received his Bachelor of Law degree from that University in 1928. During 1940-41 he was a Special Graduate Fellow at the Columbia University Law School, where he received the LL.M. degree. His graduate research was in Contracts and was supervised by Edwin W. Patterson, Cardozo Professor of Jurisprudence at Columbia.

Five years as an attorney for the Missouri State Highway Commission and four years of private practice as a member of the firm of Otto & Boyer at Washington, Missouri, preceded his entrance into law teaching at Kansas City. BOYER was called to active duty with the Army in December of 1941, under his commission as Major in the Infantry Reserve. He was promoted to Lieutenant Colonel in 1943 and to Colonel in 1945. His first Army assignment was in Civilian Defense Organization work in the States of Nebraska, Wyoming and North Dakota. After ten months of this duty, he was assigned to the Command and General Staff School at Fort Leavenworth, Kansas, as an instructor, and served there more than three years, being relieved from active duty in December of 1945. At the time of his release from active duty he was Chief of the Training Division of the Command and General Staff School, and was responsible for the indoctrination of new instructors as well as the conduct of the School's course for Latin-American officers. He was awarded the Army Commendation Ribbon by Major-General Karl Truesdell, Commandant, for his work at Fort Leavenworth.

Dean BOYER has been active in the work of the Missouri Bar, serving two terms as a member of its Council and on various Committees. He was appointed by the Supreme Court of Missouri as a member of the Committee to revise the Code of Civil Procedure for the State, and served from 1939 to 1941 as a member of the Sub-committee engaged in planning and drafting that revision. From 1939 to 1945 he was a Curator of Lincoln University (Missouri) and is the Chairman of the Civil Service Personnel Board of Kansas City. During

the Spring of 1946, he planned and supervised a refresher course for veterans which was given under the joint auspices of the Missouri Bar, the Kansas City Lawyers Association, and the Kansas City Bar Association. This refresher course was attended by some two hundred and seventy-five lawyers. Although it primarily was intended to benefit returning lawyer-veterans, it actually developed into a useful course for members of the local Bar. A member of the American Bar Association since 1929, BOYER belongs also to the Missouri Bar, the Kansas City Bar Association, and the Lawyers Association of Kansas City.

Rudolph HEITZ

■ Effective at the beginning of the second semester on February 1, RUDOLPH HEITZ became the Dean of the School of Law of the University of Kansas City. He had been a part-time professor in law for some time and an associate of the Kansas City law firm of Lathrop, Crane, Sawyer & Righter.

HEITZ received his A.B. degree in 1932 and his LL.B. degree in 1934, both from the University of Missouri, and his LL.M. degree in 1942 from the University of Michigan. He served as an advisor of the Sub-committee on Suggestions and Plans for the Missouri Supreme Court, and he is a member of the Committee on Practice and Procedure for that Court. He was a member of the Committee on Legal Education of the Missouri Bar Association in 1940-41 and has contributed articles to the *Missouri Law Review*, the *Law Review of the University of Kansas City*, and other legal publications.

Opinions of Professional Ethics Committee

OPINION NO. 271
(October 25, 1946)

CONFLICTING INTERESTS—It is not unethical for the firm of which a lawyer is a member to represent him as trustee in bankruptcy, receiver or other fiduciary. Opinion 181 overruled.

■ The opinion of the Committee has been asked as to whether a lawyer who is a trustee in bankruptcy may properly be represented by his firm; or whether this constitutes a violation of *Canon 6*, declaring it to be unprofessional to represent conflicting interests, or of *Canon 32*, requiring loyalty to the law and fidelity both to private trust and to public duty.

Canons 6 & 32
Opinion 181

The opinion of the Committee was stated by MR. MILLER, Messrs. Drinker, Houghton, Jackson, Powell and Shackleford concurring. Mr. Hostetler was not present and did not participate.

In *Opinion 181*, rendered in 1938, prior to the adoption of the present Bankruptcy Act, the Committee held that where a lawyer had been appointed co-receiver of a large corporation it was unethical for the law firm of which he was a member to represent the receivers. The basis of this opinion was that it was to the interest of the receivers as representing the creditors and stockholders to keep the attorney's fee within reasonable limits, and that a conflict of interest resulted in having an attorney who was interested in both fees, irrespective of the fact that the employment of the firm was apparently advisable from the standpoint of economy of administration.

Since the adoption of this opinion, the Bankruptcy Act has been amended to provide that in every case the attorney for the trustee in bankruptcy must receive the approval of the court, which makes the question as applied to trustees in bankruptcy a quasi-judicial one, with which, by sub-paragraph (c) of Section 12 of the By-laws of the Association, this Committee is not authorized to deal.

Several Federal judges were consulted in this connection and said that they would have no hesitation in approving the appointment of the receiver's firm as attorneys for a receiver merely because of a possible conflict of interest relative to counsel fees. This appears to be general practice in the Federal courts.

While the specific question as to trustees in bankruptcy might be disposed of on the ground that it involved a question of judicial discretion, the same principle would be applicable to receivers, the specific subject of *Opinion 181*, and also to executors or other fiduciaries. It is believed to be general practice where a lawyer is appointed executor, to have his firm represent him and, so far as we know, no question has been raised as to the propriety of this. The fees of counsel for all fiduciaries could in any case be questioned by any interested party and be subject to the approval of the court in which the accounting was rendered. The Committee is of the opinion that there is no ethical impropriety in a trustee in bankruptcy being represented by the firm of which he is a member and that the same principle applies to executors, administrators, guardians, etc. and other similar fiduciaries.

The Committee is of the opinion that the same principle applies to receivers and, accordingly, *Opinion No. 181* is overruled.

OPINION NO. 272
(October 25, 1946)

DIVISION OF FEES—Lawyer may not divide fees with an accountant, but may employ him on a salary to advise him but not his clients.

INTERMEDIARIES—Accountant employed by a lawyer independently certifying balance sheets for lawyer's clients.

CONFLICTING INTERESTS — Lawyer also practicing accounting.

ADVERTISING, DIRECT & INDIRECT —Lawyer holding out certified accountant as his employee.

CANDOR & FAIRNESS—Lawyer using employee accountant to certify balance sheets would be required to disclose that he is such an employee.

■ The chairman of the Unauthorized Practice Committee, at the instance of the National Conference of Lawyers and Certified Public Accountants, has submitted to the Committee, as well as to the Ethics Committee of the American Institute of Accountants, the following questions:

"1. Is it ethical for a firm of lawyers to employ a certified public accountant on a salaried or other compensatory basis, and permit the certified public accountant to prepare and certify financial statements under his own name as a C.P.A., for the use of the clients of the law firm. Does it make any ethical difference if the said services of the accountant are billed to the client separately, and the law firm participates in no way in the compensation received for the said accounting services? Does it make any ethical difference if, by leave of absence or other temporary arrangement, the law firm considers that the accountant renders the said services on his own time, and the accountant bills client independently?

"2. Is it ethical for a lawyer to be employed by a firm of accountants on a salaried or other compensatory basis, and to practice law for the clients of the accounting firm? Does it make any ethical difference if the services of the lawyer are billed to the client separately, and the accountant firm participates in no way in the compensation received for the legal services? Does it make any ethical difference if, by leave of absence or other temporary arrangement, the lawyer considers he is rendering the legal services on his own time, and the lawyer bills the client independently?

"3. Does *Opinion 269* make it unethical for a lawyer who is also a Certified Public Accountant to prepare and certify financial statements under his own name as Certified Public Accountant? Assuming that *Canon 33* and *Opinion 269* declare it unethical for him to go into partnership with an accountant and continue to practice law for the clients of a firm, is it ethical for him to go into partnership with a lawyer and continue to practice accountancy for the clients of the firm? Does it make any difference if by billing separately or maintaining separate offices, or by any other method, he considers that the partnership has no interest in the accounting work?"

Canons 6, 22, 27, 33, 34 and 35
Opinion 269

The opinion of the Committee was stated by Mr. DRINKER, Messrs. Houghton, Jackson, Miller, Powell and Shackleford concurring. Mr. Hostetler was absent and did not participate.

In passing on the following questions the Committee does not, of course, undertake to pass on questions of law, statutory or otherwise, varying in the several states.

In every case where a lawyer performs services for a client which could be performed by one not a member of the Bar, nevertheless, in performing them in the course of his legal services he is acting as a lawyer and subject to the Canons.

1. (a) Is it ethical for a firm of lawyers to employ a certified public accountant on a salaried or other compensatory basis, and permit the certified public accountant to prepare and certify financial statements under his own name as a C.P.A. for the use of the clients of the law firm?

It is entirely ethical for a firm of lawyers to employ a public accountant (whether a C.P.A. or not) on a salaried basis to advise the law firm on matters of accounting and to assist the firm in connection with accounting problems arising in its law practice. For a law firm to employ an accountant on the basis of a division of the fees of the law firm would violate *Canon 34*, forbidding the division of legal profits or fees with those not lawyers. To permit such an accountant to certify statements under his own name as a C.P.A. for the use of clients of the law firm would violate the provision of *Canon 35* requiring the lawyer's relation to the client to be personal and direct, without the intervention of any lay intermediary.

In the course of a law suit, a corporate reorganization, the management of an estate or some other legal activity, it occasionally becomes necessary to have a balance sheet certified without the necessity of certification by an independent accountant.

A law firm could not furnish a certificate of a C.P.A. in its employ to a client for public use of the client without a disclosure in connection with the certificate that the C.P.A. was an employee of the law firm. However, we have frequently ruled that for a law firm to state publicly that it has in its employ a C.P.A. constitutes a violation of *Canon 27*. Accordingly, it would seem impossible for the law firm to furnish the statement specified without violating this Canon.

1. (b) Does it make any ethical difference if the said services of the accountant are billed to the client separately, and the law firm participates in no way in the compensation received for the said accounting services?

Assuming, as the question does, that the services are performed for the clients of the law firm as such, and that the accountant is known by the client as an employee of the law firm, the fact that the law firm does not participate in the compensation would, in our opinion, make no ethical difference.

1. (c) Does it make any ethical difference if, by leave of absence or other temporary arrangement, the law firm considers that the accountant renders the said serv-

ices on his own time, and the accountant bills client independently?

The relation of the law firm, the accountant and the clients contemplated by these questions, are, in our opinion, too close to be insulated by any such artificial arrangement.

2. (a) Is it ethical for a lawyer to be employed by a firm of accountants on a salaried or other compensatory basis, and to practice law for the clients of the accounting firm?

The last paragraph of *Canon 33* is as follows:

"Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

Canon 35 provides:

"The professional services of a lawyer should not be controlled or exploited by any lay agency personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. . . ."

A lawyer may properly be employed by a firm of accountants on a salaried basis to advise the accounting firm, but such employment may, under no circumstances, be used to enable the accounting firm to render legal advice or legal services to its clients.

Should a lawyer be employed by a firm of accountants on the basis of receiving a percentage of the firm profits or fees, this would result in such close professional association between them as to be equivalent, for the purpose of *Canon 35*, to a partnership between them; and under our *Opinion 269* would necessitate the subsequent confinement of the lawyer's activities to such as were permitted the lay accountants.

2. (b) Does it make any legal difference if the services of the lawyer are billed to the client separately, and the accountant firm participates in no way in the compensation received for the legal services?

No such artificial device would, in our opinion, change the result.

2. (c) Does it make any ethical difference if, by leave of absence or other temporary arrangement, the lawyer considers he is rendering the legal services on his own time, and the lawyer bills the client independently?

Our answer is the same as that to 2 (b).

3. (a) Does *Opinion 269* make it unethical for a lawyer who is also a Certified Public Accountant to prepare and certify financial statements under his own name as Certified Public Accountant?

The primary basis of *Opinion 269* was the express prohibition of *Canon 33* against partnerships between lawyers and laymen, as well as that of *Canon 34* forbidding a division of fees with laymen. The prohibition of *Canon 27* against advertising was involved only collaterally, there being no prohibition against advertising by laymen.

In the case of a lawyer who is also a C.P.A., *Canons 33* and *34* are not applicable.

The Committee all deem it in the interest of the profession and its clients that a lawyer should be precluded from holding himself out, even passively, as employable in another independent professional capacity. We find no provision in the Canons precluding a lawyer from being a C.P.A., or from using his knowledge and experience in accounting in his law practice.

We are all confident that a lawyer could not, as a practical matter, carry on an independent accounting business from his law office without violating *Canon 27*.

The Committee all agree that a lawyer, who is also a C.P.A. may perform what are primarily accounting services, as an incident to his law practice, without violating our Canons. We are also agreed that he may not properly hold himself out as practicing accounting at the same office as that in which he practices law, since this would constitute an advertisement of his services as accountant which would violate *Canon 27* as construed in our opinions.

The Committee is divided as to whether the Canons impliedly forbid a lawyer to practice accounting (including the certification of financial statements as an independent accounting activity) where this is done in accordance with our Canons and is not done for the purpose of feeding his law practice. A majority of the Committee are of the opinion that a lawyer, holding himself out as such, may not also hold himself out as a certified public accountant at any office without violating *Canon 27*, because his accounting activities will inevitably serve as a feeder of his law practice. A minority of the Committee, while agreeing that, as a practical matter, a lawyer could not properly carry on a considerable accounting practice and keep it independent of his law practice or avoid other violations of the Canons, nevertheless, find nothing in the Canons which precludes a lawyer from attempting to carry on both professions, wholly independent of one another, at the same time but from a different office with different stationery and where in practicing accounting the lawyer follows all the Canons pertaining to lawyers.

3. (b) Assuming that *Canon 33* and *Opinion 269* declare it unethical for him to go into partnership with an accountant and continue to practice law for the clients of a firm, is it ethical for him to go into partnership with a lawyer and continue to practice accountancy for the clients of the firm?

The answer to this is covered by that to 3 (a).

3. (c) Does it make any difference if by billing separately or maintaining separate offices, or by any other method, he considers that the partnership has no interest in the accounting work?

The method of carrying on the work or of billing for accounting services would be material only as indicating or negativing the conclusion that they were carried on primarily to advertise or as a feeder to the law practice.

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Letters to the Editors

Respect for the Courts

To the Editors:

In your November issue (32 A. B. A. J. 762) there appears an editorial captioned "Respect for the Courts?," which I feel is misleading as regards a fundamental principle involved in our democratic form of society.

This editorial is critical of some comments made by Harold L. Ickes in a syndicated column which he writes wherein he derided the conduct of certain federal judges. In your editorial you made the following statement: "Men in high place undermine basic American institutions and freedoms when they deride the Courts and hold them up to public scorn." It is with this statement that I completely disagree. I hold no brief for Mr. Ickes or his kind. As a matter of fact, I have never believed that Mr. Ickes has contributed anything of substance to the cause which he claims to advocate. So, while I might agree with this criticism of Mr. Ickes on general principles, I cannot agree with the tenor of your editorial. The principle involved is much like due process of law or freedom of speech. In the exercise of the great constitutional rights guaranteed to a free people, it is the right of exercise that is important rather than the manner in which the right is expressed. The law takes care of those instances where a citizen exceeds his right and no great harm is done but the tragedy is when the exercise of the right in the first instance is suppressed or discouraged.

The writer has had nearly twenty-five years' experience as a lawyer and a judge and believes that he is fairly well acquainted with American institutions, including the Courts. To my way of thinking, it would be a tragedy of the first degree to convince the American people that Courts are not to be criticized or are not to be derided, if you please. Some judges and lawyers make the mistake of believing that the Courts are a special property of the bench and Bar and not in the same category as other public institutions. In my experience, I have never perceived that judges are any different than other mortals. Some hair-splitting rationalizers attempt to make a distinction between Courts and judges. Legally, there is a difference but practically, so far as the public is concerned, there is no difference. You cannot separate the Court from the judge who graces or disgraces it. What the judge is, the Court must be. There are judges who are crooks; there are judges who are hypocrites; there are judges who are so ignorant and lacking in ability that they hardly suspect the existence of law; and there are judges who are *both honest and able*. The institution of the Courts must suffer condemnation and receive praise according to the product that sits upon the bench. If we could arouse the interest of the people in their Courts, judicial clowns and crooks would find it more difficult to retain a place upon the bench they now degrade.

While it may sound harsh to say that there are judges who are crooks, such things must be said because the records of our criminal Courts and various impeachment proceedings prove that judges have been guilty of the worst type of crimes in their judicial conduct. And what is wrong in telling the people these things? In my opinion, it would be a sad thing to cover up the truth about the lapses of the judiciary and it would be just as sad a thing to restrain Mr. Ickes or anyone else from giving his views concerning the conduct of judges, even if such views might be calculated to "ruffle" the feelings of judges in general. If lawyers would courageously tell the people about their judges—tell them the truth—tell them about the good judges and the bad judges—they would thereby perform their most valuable public service. (Lawyers fear to do this because some say that they have to practice before these judges.)

Let us remember that the Courts belong not to the judges and lawyers but to the people. When any public official or institution is placed beyond criticism—both fair and unfair—God help the Republic. There can no more be selective criticism than can there be selective freedom of speech. Particularly, the lawyers of this country could improve the judiciary if they were only courageous enough to do so. Yet, we hear the same type of speech from the rostrums of Bar Associations pointing out the need

Editor's Note: Because Mr. McKeage has written ably and earnestly in support of a reasoned view which deserves full consideration by lawyers and the public, and because his letter was written before he and other readers received word of our enforced limitation on the length of "Letters to the Editors" (33 A.B.A.J. 47), we publish his spirited communication in full. Nothing in the editorial which he discusses was intended to suggest that Courts or judges should be regarded as exempt from frank and vigorous criticism, by lawyers, by the public, or by members of the judiciary. Our observations were directed to the type of comments which Mr. Ickes made as to the Supreme Court and a three-judge Court and to the "commercializing" of such expressions in his syndicated column. Reasoned and outspoken criticism of Courts and judges, their conduct and their decisions, is an historic right of lawyers and the public—a right which the JOURNAL freely exercises and would not withhold from anyone else. To deride Courts and judges for the purpose of undermining their authority or in effect intimidating their independent action is something else: a moral sense of the "fitness of things" should underlie criticisms of institutions on which so much depends. Mr. McKeage has rendered a service by limning the issue; it may be that, preponderantly, our readers will agree with him.

for improvement of the judiciary and usually winding up with an inference that the criticisms contained therein have no application to the local judiciary, than which no better bench exists, when in truth and in fact these speakers before bar associations know that the local judiciary is in just as much need of improvement as the mythical judiciary alluded to. Of course, most undesirable situations survive because of the lack of courage on the part of those who should lead the reform movement.

In connection with your editorial which I have been so bold as to criticize, I call your attention to your editorial in the same issue concerning Mr. Justice McReynolds, wherein you quote his most critical and deriding statements concerning the majority opinion in the "gold-clause" decision of the Supreme Court of the United States. You point out that Mr. Justice McReynolds stated that the dissenting judges felt "shame and humiliation" at the action taken by a majority of their colleagues. Mr. Justice McReynolds was not alone in making caustic statements relative to decisions of the Supreme Court. As a matter of fact, some of the most ridiculing statements that have ever been made concerning decisions of the Supreme Court have been made by the dissenting justices. I have never heard lawyers say that these dissenting justices were undermining "basic American institutions and freedoms" by so severely criticizing their colleagues with whom they disagreed on a question of law. William Jennings Bryan put it in a nutshell when he said that if you wished to read criticism of the Supreme Court, read the dissenting opinions of the justices of that Court. I most sincerely believe that any institution that cannot withstand criticism, both fair and unfair, just and unjust, is an institution that does not lend itself to the approbation of the American people.

I am not unmindful of the obligation of a lawyer to maintain due respect toward the Courts, but I do not conceive that obligation to involve refraining from criticizing Courts generally and specifically. If such criticism goes beyond the legitimate limits of the law, there are remedies and forums in which such conduct may be redressed.

EVERETT C. MCKEAGE
San Francisco, California

A Suggestion from a Reader

To the Editors:

Under "Cut and Clip, or Bind Your Journal," on page 866 of your December issue, you discuss methods of preserving issues of the JOURNAL for future reference to special articles or for other purposes.

As an inexpensive return for the pleasure I get from reading your excellent publication, please let me suggest that I believe my method of filing magazines and papers of all kinds would be of help to your other readers. At any rate, it is a method that is efficient, and requires a minimum of brains, expense, or labor to operate. It even handles easily such overwhelming publications as the *Federal Register*.

For magazines of the size of your JOURNAL, I use a red fibre expanding envelope, size 9½ x 11¾, expansion 1¾ inches, in which the magazines are placed upon arrival, for reading at the first opportunity. On the expansion back of the envelope I write in large black letters, with pencil, the title and dates of issues contained, for example: "A.B.A. JOUR., Jan. 1945-Dec. 1945". Reference to any special article for future review is made on an index card, which is filed in a box on my desk. The title and page of the article is also noted on the side of the envelope, for use when I lose or misplace the index card. The envelopes are placed on end in the book shelves and are as instantly available as any book.

Expanding envelopes are available in all sizes from 3⅞ x 8½ to 12 x 18, expansion 1¾ or 3½ inches, which makes it possible to accommodate most any kind of publication that appears on the scene.

LINCOLN LEE WATKINS
Richford, Tioga County, New York

Editor's Note: We publish Mr. Watkins' suggestion, from his experience and interest. It may have utility for some of our readers. The best judgment we can get from many sources, however, is that the JOURNAL has come to be worth binding and keeping in some such form as was suggested in the editorial to which Mr. Watkins refers.

"Super-Government or Super-State"

To the Editors:

I should like to challenge one statement made by Frank E. Holman in his very interesting article on "World Government No Answer for America's Desire for Peace" in your October number (pages 642-45, 718-21).

He refers to the parenthetical phrase in the Resolution adopted by the House on September 12, 1944, "that the American Bar Association, while opposing as unnecessary and unwise the creation of any manner of super-government or super-state", and then states that "The House of Delegates has not withdrawn or changed its declaration against a 'super-government or super-state'".

I should like to call attention to Paragraph (d) of the Resolution adopted on July 2, 1946, as reported at page 469 of the August JOURNAL, which recommends as follows: "The conferring of specific, but clearly defined and limited legislative powers on the General Assembly to deal with new and grave subjects of international concern, including" an enumeration of specific matters.

When this recommendation was presented to the House, I remember that I spoke on the subject and congratulated the Association on its recession as expressed in this recommendation from the stand taken on September 12, 1944, to which I was opposed in the first place. I do not remember that any member of the House even suggested that I was wrong in my interpretation of this language. It seems to me quite clear that there cannot be a General Assembly with any legislative powers at all without calling it a government; and if the powers include a binding obligation on all of the members of The United Nations, I do not see how it can avoid being called either a super-government or a super-state.

I am not criticizing the later action of the Association; quite the contrary. I welcome it and consider it a laudable development and broadening of what seemed to me to be thinking in a very constricted field.

CHARLES M. LYMAN

New Haven, Connecticut

Editor's Note: The 1944 and 1946 actions voted by the House (30 A.B.A.J. 659 and 32 A.B.A.J. 465) of course speak for themselves. Members of the Association may and do put their own construction on them and on what constitutes "a super-government or super-state" (30 A.B.A.J. 545). Former Judge Frederic M. Miller did this in our October issue (page 639), and Frank E. Holman gave a contrary view (page 642), to which Mr. Lyman takes exception. The House of Delegates expressed itself in favor of giving defined but limited legislative powers to the General Assembly of The United Nations, notably as to the control of atomic energy; but the House predicated this on the adoption of "weighted representation", rather than equality of voting in the Assembly. The declared foreign policy of the United States, as expressed repeatedly by Secretary Byrnes, Mr. Baruch, Senator Vandenberg, Senator Connally, and Delegate Warren R. Austin, is that the legislation for control of atomic energy shall be consummated only by a multipartite treaty requiring ratification by the Senate of the United States. In this connection, Reginald Heber Smith's review of the latest report of The United Nations' Atomic Energy Commission, elsewhere in this issue, contains a clear analysis. Later than the action referred to by Mr. Lyman, the House of Delegates on October 31, 1946, unanimously approved, and urged undivided support of, both The United Nations and the foreign policy of the United States (32 A.B.A.J. 871-73). The Association's Committee reported in October that "At least a substantial majority of your Committee still oppose 'as unnecessary and unwise', as the House voted (30 A.B.A.J. 545), 'the creation of any manner of super-government or super-state' " (32 A.B.A.J. 872). The House's consideration of the subject will doubtless be continued at its meeting this month.

W. L. R.

"Overcrowding" in the Profession Five Centuries Ago

"Whereas of time not long past within the City of Norwich and the Counties of Norfolk and Suffolk there were no more but six or eight atturnies at the most, coming to the King's Courts, in which time great tranquillity reigned in the said City and Counties, little trouble or vexations was made by untrue and foreign suits. And now so it is that in the said City and Counties there be four score atturnies or more, the more part of them having no other thing to live upon, but only his gain by the practise of atturneyship and also the more part of them not being of sufficient knowledge to be an atturney, which come to every fair, market, and other places, where is any assembly of people, exhorting, procuring, moving and inciting the people to attempt untrue and foreign suits for small trespasses, little offences, and small sums of debt, whose actions be triable and determinable in Court Barons, whereby proceed many suits more of evil and malice, than of truth of the thing, to the manifold vexations and no little damage of the Inhabitants of the said City and Counties, and all to the perpetual diminution of all the Court Barons in the said Counties, unless convenient remedy be provided in this behalf. The foresaid Lord the King considering the premises, by the advice, assent and authority aforesaid, hath ordained and established, that at all times from henceforth there shall be but six common atturneys in the said County of Norfolk and six common atturneys in the said County of Suffolk, and two common atturneys in the said City of Norwich to be atturneys in the Courts of Record, and that all the said fourteen atturnies shall be elect and admitted by the two Chief Justices of our Lord the King for the time being, of the most sufficient and best instructed by their discretions. And that the election and admission of all atturnies which shall be elected and admitted by the said Justices for the time being, above the said number in the said Counties, shall be void and of no authority nor record. And if any person or persons usurp or presume to be atturney in Courts of Record in the said Counties or City otherwise than before is specified, and that found by inquisition taken before the Justices of Peace in the said City or Counties (which shall have power by virtue of this ordinance to enquire thereof in their Sessions or in any other manner lawfully proved, that then he or they that so presume, if they be lawfully convict, shall forfeit twenty pound as often as he or they be so convict, the one half thereof to be taken to the King's use, and the other half to his use which for the same will sue and he that thereof will sue shall have an action of debt against any such person which so presumeth to be atturney, and such process for recovery of the same as lieth in an action of debt at the common law upon an obligation. Provided always that the said ordinance began and first take effect at the Feast of Easter next coming and not before, if the same ordinance seem reasonable to the Justices."

—A Statute Enacted in England in 1455 During the Reign of Henry VI (33 Henry VI, C. 7.)

Practising lawyer's guide to the current LAW MAGAZINES

CONSTITUTIONAL LAW—*"Judicial Determination of Interstate Disputes":* Paul F. Good, formerly President of the Nebraska Bar Association, is the author of the leading article in the November issue of the *Nebraska Law Review* (Vol. 26, No. 1; pages 1-20), under the above-indicated title. He reviews the leading cases on disputes between States, as ultimately decided by the Supreme Court of the United States, and considers particularly steps taken by that Court to enforce decrees related to those disputes. (Address: Nebraska Law Review, Lincoln, Neb.; price for a single copy: $1.00).

CONSTITUTIONAL LAW—*Business Regulation—"Constitutionality of the Unfair-Practices Acts":* Against unfair competitive practices of local price discrimination and selling below cost, or use of "loss leaders", some twenty-eight States during the last decade have enacted statutes variously designated as Unfair Practices Acts, Fair Sales Acts, and Anti-Price Discrimination Acts. Serious constitutional problems engendered by this legislation are discussed by Jeannette E. Thatcher, of the Oregon Bar, in the *Oregon Law Review* (Vol. XXV—No. 4; pages 247-269), which is to be republished in the *Minnesota Law Review*. The author reviews generally the bases upon which the unconstitutionality of such laws as to unfair trade practices has been predicated, with special emphasis on the sales-below-cost provisions, and examines critically the present statutes of Minnesota and of Oregon in the light of the principles deduced. Her conclusions are against the constitutionality of both Acts and of others like them. (Address: University of Oregon Law Review, Eugene, Ore.; price for a single copy: 75 cents).

CONSTITUTIONAL LAW—*"Mr. Justice Murphy, Civil Liberties and The Holmes Tradition":* A survey of the civil liberties cases before the reconstituted Supreme Court, with primary emphasis on the views of Mr. Justice Murphy, is in the November issue of the *Cornell Law Quarterly* (Vol. XXXII—No. 2; pages 177-221). The author, Vincent M. Barnett, Jr., formerly of of the OPA and the WPB, now head of the Department of Political Science at Williams College, maintains that Mr. Justice Murphy has established himself as the leading proponent of the broadest kind of protection of civil liberties against inimical governmental action; also, that a majority of the members of the Supreme Court appear to have adopted his general approach, which renders the doctrine of judicial restraint and the concomitant presumption of legislative validity inapplicable to litigation involving infringement of civil liberties. The author submits that such an approach is not basically inconsistent with, or fraught with peril to, our republican form of government and cherished institutions. The uses currently made of this approach present, of course, a juridical and constitutional question on which lawyers as well as judges outside the Supreme Court may and do hold differing opinions. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

CORPORATIONS—*"The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations":* A comprehensive article by Samuel M. Hesson in the November issue of the *Cornell Law Quarterly* (Vol. XXXII—No. 2; pages 222-252) examines the statute of limitations applicable to actions to set aside fraudulent conveyances under the New York Debtor and Creditor Law, and the statute applicable to actions by creditors to reach assets of a corporation transferred in violation of corporation laws. Mr. Hesson considers also

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

the statute of limitations in the creditor's action based upon the misconduct of corporate officers and directors. He points out that while, under the New York rule, the statute of limitations on an action to set aside a fraudulent conveyance of a corporation begins to run at the time of the fraudulent transfer, a creditor may base his action on corporation laws, in which case the statute does not begin to run until execution against the corporation has been returned; also, that in an action by a creditor based upon claimed negligence of directors and officers which results in loss to the corporation, the creditor is limited to the time within which the corporation itself could sue. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

IMMIGRATION—*"The Immigration Laws of the United States—An Outline":* In view of the steadily increasing number of aliens coming to our shores, as a concomitant of both the restorations of traveling facilities and the hardships of the post-war conditions abroad, the above-entitled article in the November issue of *Virginia Law Review* (Vol. 32—No. 6; pages 1099-1162) is timely and helpful. The author, Albert E. Reitzel, Assistant General Counsel of the United States Immigration and Naturalization Service, states his purpose to be "to sketch more clearly the scope of immigration statutes presently existing rather than any policies which may have motivated their enactment." The first half of his outline deals with statutes and regulations relating to the admission and exclusion of arriving aliens; the second half, with the arrest and deportation of aliens already in this country. Since the policies of the federal government relating to the admission, exclusion and deportation of aliens are contained in some fifty odd statutes and in regulations prescribed for their enforcement by the Commissioner of Immigration and the Secretary of State, this outline obviously cannot provide the exact answer for every question arising in relation to aliens. It does give a convenient frame of reference to guide the lawyer on his way. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.00).

INTERNATIONAL LAW – *"Responsibilities of States for Injuries to Individuals":* The highly developed branch of international law that governs the responsibility of states for injuries to aliens is the subject of an analytical essay by Professor Philip C. Jessup in the November issue of the *Columbia Law Review* (Vol. XLVI—No. 6; pages 903-928). Professor Jessup, who holds the chair of International Law at the Columbia University Law School, stresses the functional approach to the determination of claims against states, which he finds is facilitated by the fact that the lack of precision in the law as thus far developed gives the Court in a particular case unusually wide latitude. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

MURDER – *"Premeditation and Mental Capacity":* A note in the November issue of the *Columbia Law Review* (Vol. XLVI—No. 6; pages 1005-1012), entitled as above, considers in some detail the decision of the Supreme Court of the United States in *Fisher* v. *United States* (66 Sup. Ct. 1318), which sustained the refusal of the trial Court in a murder case to direct the jury to consider the defendant's mental deficiency in deciding whether the killing had in fact been premeditated and deliberated. The author of the note concludes that in so deciding the Court ran counter to earlier cases in which subjective criteria were deemed acceptable. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

REAL PROPERTY—*Non-Possessory Interests—"An Analysis of Profits a Prendre":* Profits *a prendre* are encountered during the usual legal career only once—in the real property course in a law school. Lawyers who would refresh their recollection of this recondite branch of the law or who, unlike most of their professional brethren, are faced with a problem involving profits *a prendre*, will do well to consult the scholarly analysis of this subject in the June issue of the *Oregon Law Review* (Vol. XXV—No. 4; pages 217-246), by Dr. Herman H. Hahner, a former student editor of that journal. Submitted in partial fulfillment of the requirements for a graduate degree in law, the article outlines the nature of such profits, distinguishing them from easements, transfers of personal property, licenses, and conveyances of an estate; classes of profits; creation of profits; rights of the user; alienation, apportionment, and extinction of profits; and their duration. (Address: University of Oregon Law Review, Eugene, Ore.; price for a single copy: 75 cents).

SOCIAL SECURITY—*"Recent Developments in the Washington Old Age Assistance Program":* An interesting summary of the provisions and administration of the Old Age Assistance statute in the State of Washington is the leading article in the November issue of the *Washington Law Review* (Vol. XXI—No. 4; pages 189-205). The author, Vern Countrymann, formerly clerk for Justice William O. Douglas and in 1946 an Assistant Attorney General of the State of Washington, gives special emphasis to the need for

clarifying amendments. (Address: Washington Law Review, University of Washington, Seattle, Wash.; price for a single copy: 50 cents).

TAXATION—*Federal Income Taxes—"The Treasury Interprets the Clifford Case":* In the *Fordham Law Review* for November (Vol. XV-No. 2; pages 161-190), Joseph B. Lynch, of the New York Bar, analyzes the attempted solution by the Treasury Department (in T.D. 5488) of the problems posed by the decision of the United States Supreme Court in *Helvering* v. *Clifford,* where the luckless grantor was held to be taxable on the income of a trust set up by him for his wife. After five years of litigation following the *Clifford* decision, the Treasury Department has attempted to crystallize or formalize the rules under which a grantor will be held taxable upon the income of a trust created by him, the three general factors considered determinative being (1) reversionary interest; (2) power to dispose of beneficial enjoyment; and (3) power of administrative control. The author, while saying that the Treasury is to be commended for undertaking the task of bringing order out of chaos, considers that the present regulations are so far out of focus with judicial interpretation that further litigation is unavoidable. He suggests the necessity of a legislative solution to the problem. Whether the further interpretation of the *Clifford* case announced by the Commissioner, after the publication of Mr. Lynch's article but not as yet released, will ease the Bureau's present rules, remains to be seen. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: $1.00).

TAXATION—*"Some Notes on the Income Taxation of Farmers":* A pragmatic and useful discussion of the above-quoted subject is in the December issue of the *Canadian Bar Review* (Vol. XXIV—No. 10; pages 889-903). It is based on an address before the Taxation Section of the Canadian Bar Association at its 1946 meeting, by G. W. Auxier, of the Edmonton Bar. In view of the parallels between income tax laws in the United States and Canada, the exposition of the practical workings of income taxes as affecting Canadian farmers, and of the need for a new and remedial approach, will interest lawyers south of the border. Those who have to deal with income tax matters for American farmers will find in it "grass roots" material as to an aspect of income taxes which has not been treated extensively in American reviews. (Address: Canadian Bar Review, Ottawa Electric Building, Ottawa, Ontario; price for a single copy: 75 cents).

TAXATION—*"The Octroi and the Airplane":* A contribution by Arthur E. Sutherland, Jr., and Stephen P. Vinciguerra in the November issue of the *Cornell Law Quarterly* (Vol. XXXII—No. 2; pages 161-176) argues for federal regulation of State import duties, in order to protect interstate trade from confiscation by multiple imposts. The authors are of the opinion that the regulation of State taxes is handled at the present time by the Supreme Court with difficulty and in spasmodic and unrelated instances of litigation; they urge that the Congress should devise and enact a National policy which will give recognition to the States' needs for revenue and still protect the flow of commerce. They submit that such a statute should provide a comprehensive and detailed standard for the guidance of an administrative agency charged with the duty of allocating tax opportunities among the States, after consultation with State officials. Realty and chattels having a fixed place in a State should be left to State control, the authors think, but State taxes bearing on interstate commerce and designed to reach assets not allotted to the particular State by the agency, would be rendered invalid. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

TORTS—*"Newspapers and the Law of Libel":* An interesting and instructive article on the law of libel, by Alexander Stark, of the Toronto Bar, is in the December issue of the *Canadian Bar Review* (Vol. XXIV—No. 10; pages 861-878). It is a paper read by the author before The Lawyers Club of Toronto, and sets forth in simple and direct terms the fundamental principles of the law of libel. These are illustrated by succinct references to leading cases decided by English and American Courts. A more concise and accurate statement of many aspects of the modern law of libel, particularly as applied to newspapers and other periodical publications, has not come to the attention of this department. Lawyers who have occasion to deal with the law of libel will do well to obtain and keep a copy for reference and supply copies to their clients. (Address: The Canadian Bar Review, Ottawa Electric Building, Ottawa, Ontario; price for single copy: 75 cents).

TRADE-MARKS — *"The New Trade-Mark Act of July 5, 1946":* A valuable analysis of the Lanham Trade-mark Act, which will become effective on July 5, 1947, is in the November issue of the *Columbia Law Review* (Vol. XLVI—No. 6; pages 929-950), by Rudolph Callman, member of the New York Bar and author of a standard treatise on trade-marks. The article annotates in consecutive order the principal provisions of the new statute. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

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Our Younger Lawyers

by **William R. Eddleman** • Secretary, Junior Bar Conference

■ One of the heritages of the profession of law has long been the efforts to see to it that no person's cause is rejected or neglected for lack of money on his part. Included in the oath taken by attorneys on their admission to practise before the Bar of Courts of many States, is: "I will never reject from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice."

Members of the American Bar Association under the age of 37 years are continuing these efforts at this time. Particularly have these considerations been active in the operations of the Small Litigant Committee. One of its primary activities has been a survey of the operations of small loans and "loan sharks". A few years ago, the San Francisco Barristers conducted an intensive survey and campaign in the San Francisco Bay area. Subsequently, a small loan survey was conducted in the State of Kansas, under the auspices of the younger members' section of the American Bar. An excellent program in the small loan field was later developed in the State of Oklahoma, in which the present Chairman of the Conference participated actively. It was then determined that a survey should be conducted in the State of Alabama. Lawrence Dumas conducted the study and prepared a report which was completed during 1944-1945, and is now being distributed.

This year the Conference's Committee is under the direction of Randolph W. Thrower, of Atlanta, Georgia, who is exerting fine efforts to make the work an accomplishment for 1946-1947. During the year it is contemplated that further surveys will be undertaken in other States in which the operations and activities of the small loan sharks are considered to be most offensive.

Further activities of this Committee consist of endeavors to improve the administration of justice in the lower Courts, or courts of first impression, such as our justice of peace courts throughout the Nation. In Missouri an effective job has been done in this field through the establishment of a new set of constitutional provisions and statutory law governing the procedure and the requirements for justices of peace. The Washington State Bar Association at its last meeting adopted a proposal which will commend to the State legislature a complete study of the Justice of Peace system, directed toward preparation of the necessary legislation to modify the procedure and improve the entire structure of the lower courts of the State of Washington.

Another Conference committee which will be active again this year is that on Cooperation with the Inter-American Bar. It is hoped that some of the younger lawyers can attend the sessions at Lima, Peru. This Committee is under the Chairmanship of William Gillen, of Tampa, Florida. It is engaging in correspondence in Spanish with leading young representatives of the various Bar Associations of the Latin Americas. It is hoped that it will be possible to distribute again this year a Spanish edition of the *Young Lawyer*. It was a particular pleasure to your Secretary during the Christmas season to receive Christmas salutations and tokens from a number of the young lawyers of the Latin Americas, including such personages as the former Attorney General of El Salvador and the former Vice Secretary General of the Inter-American Bar, Dr. Juan Serarols of San Salvador, El Salvador and Lic. Enrique Perez Verdia of Mexico City, Mexico.

One of the important functions of the Conference is a coordination of the activities of the American Bar for younger members with the activities of the younger members of the other Bar Associations, local and State. It is requested that the various local younger-member Sections and Committees communicate with the National Secretary and supply data with reference to their program and personnel, so that the same can be publicized in future Junior Bar Notes. We have records of more than fifty such local organizations. A considerable increase in the number, activities and effectiveness of such organizations can be looked for.

Each year the Conference confers a special Award of Merit on the local younger lawyers' Section which performed the most outstanding service during the preceding year; and likewise, an award to the State younger members' Section which achieves the most outstanding record. Applications for these awards must be filed at or in advance of the annual meeting, so that they may be considered fully and the awards made.

For 1945-46 these awards went to the Milwaukee local Bar and to the Indiana State Bar.

A recent report from the State of Missouri is that the younger members abolished "the Junior Bar" because they did not like the name. In its place they established a Younger Lawyers' Committee. There seems to be a preference for such a description as Young Barristers or Young Lawyers' Section.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakely, Dallas, Texas, Philip Bardes, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Contingent Reversions Under the Hallock Rule

The Treasury, the Tax Court, and the Circuit Courts continue to wend their divergent ways under the *Hallock* and *Fidelity-Philadelphia* decisions of the Supreme Court. In its recently amended regulations (T.D. 5512, May 1, 1946), the Treasury holds that the estate tax applies to a contingent reversion if both of the following conditions exist: (1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property.

The Tax Court has refused to apply this test. In *Edward P. Hughes Estate*, 7 T.C. No. 157, the grantor in a trust created before 1931 reserved the income for life, with remainder to his children or their issue, and with cross-remainders upon the prior death of any of the children without surviving issue. No beneficiary was named to take in the possible contingency that the grantor should outlive all of the remaindermen. The Tax Court held that there was no estate tax. The court apparently felt that this was a common case of contingent reversion by operation of law, and attached no significance to the fact that the event required to vest the remainder interest was the death of the grantor prior to the death of the remaindermen.

In contrast, the Seventh Circuit sustained the estate tax in *Com'r* v. *Spiegel Estate* (December 28, 1946). The trust in that case provided that income could be used for the support of his children during the grantor's life, and that the corpus and any accumulated income should be paid upon the grantor's death to his surviving children or their descendants. It is probably true that a bequest to A or his "descendants" is not the same as a bequest of A or his "heirs". Therefore, the trust permitted a reversion to the grantor's estate by operation of law. Moreover, the event which terminated that reversion was the death of the grantor before the remaindermen. Thus, this case is squarely covered by the regulations. The Circuit Court's opinion, however, is not clearly predicated upon the survivorship factor; to the contrary, it seems to indicate that any reversionary interest is sufficient to justify the tax, and thereby goes even beyond the regulations.

The American Bar Association has recommended a statutory amendment which would tax all reversionary interests at their actuarial value at the time of death. If any further support were needed for this simple and equitable rule, the present confusion in the courts would furnish that support.

New Regulations Under the Clifford Rule

In its recent regulations under the *Clifford* rule, issued December 29, 1945, the Treasury attempted to lay down a series of precise tests for determining whether the income of a family trust is taxable to the grantor. Reg. 111, Secs. 29.22(a)-21, 22. The Treasury has now announced that a revision of these regulations is under consideration to permit more flexibility in administration of such trusts without adverse tax consequences to the grantor. Under the procedure instituted by the Treasury following the enactment of the Administrative Procedure Act, the proposed revisions will be made public in advance so that all interested parties may present their views.

Contemplation of Death— Assignment of Insurance

The Tax Court seems to hold that the assignment of an insurance policy by the insured during his lifetime is almost necessarily a transfer "in contemplation of death", and thus subject to estate tax. In *Arthur D. Cronin Estate*, 7 T.C. No. 162, the decedent made irrevocable assignments of several groups of policies to his wife, within a few weeks of the time that he made his will. Although the court relied upon this circumstance, the opinion indicates that it was not necessary for the result. Because insurance is "inherently testamentary in nature", the court reasons that a transfer of such property is also "testamentary". The court refused to give weight to the present rights granted to the wife (e.g. the right to borrow), because it was intended that those rights should only secure the ultimate proceeds of the policies. The estate argued that the decedent's motive was to protect the policies from the hazards of his business; this argument was rejected on the dual ground that the facts did not indicate this to be the dominant motive, and that such motive was in any event not inconsistent with a "testamentary disposition".

It may be noted that nowhere in the opinion is there a mention of estate tax savings as a motive for the transfer. Under the decision, it is difficult to imagine an insurance assignment which is not vulnerable. The only possible comfort to a taxpayer in this type of case is the fact that there were three dissents and two concurrences in result.

Check as Income— Cash Basis Taxpayer

When does a check become taxable income to a cash basis taxpayer? The Seventh Circuit, affirming a Tax Court decision, has held that a check received on December 31 is taxable that year, at least where the taxpayer received it in time to cash it on the day it was received. *Lavery* v. *Com'r* (December 3, 1946), aff'g 5 T.C. 1283.

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The Association's Assembly:

Proceedings at the 69th Annual Meeting

■ The 1946 Assembly was of "pre-war" diversity and quality, as the forum of the members attending the Atlantic City convocation. It was signalized by many notable addresses of far-reaching significance; several of them were published in our December and January issues. Its sessions included a lively "open forum" on the proposed amendments of the Rules of Civil Procedure for the United States District Courts. Chairman William D. Mitchell of the Advisory Committee gave an informative explanation of the amendments; members of the Association expressed vigorously their views as to some of the changes. Disapproval of the amendment deemed to broaden adversary access to a lawyer's files was voted by the Assembly and concurred in by the House. More than the usual number of Resolutions on controversial subjects were offered by members from the floor, were reported by the Resolutions Committee after hearings and were debated vigorously and voted on in the Assembly. A few differences developed between the Assembly and the representative House; these were ironed out. The whole record is of animated and worthwhile sessions in the Assembly, as a part of an impressive and useful Annual Meeting.

ASSEMBLY: FIRST SESSION

■ The traditional first session of the Assembly opened the Sixty-ninth Annual Meeting of the Association. It was convened in the great ballroom of the Convention Hall in Atlantic City, New Jersey, on Monday morning, October 28. The auditorium was impressively filled; many of the Association's distinguished guests were present. The meeting had plainly returned to a pre-war scale. President Willis Smith, of North Carolina, was in the chair.

President Walter G. Winne, of the New Jersey State Bar Association, warmly welcomed the meeting and its guests to New Jersey. President Frank S. Farley, of the Atlantic City Bar Association, extended a cordial welcome for that organization. American lawyers had not met in Atlantic City since 1931.

Robert F. Maguire, of Oregon, made a felicitous response, for the members present, to the address of welcome. "We are gathered here in the East", he said, "from the West and from the North and from the South, as members of the great brotherhood of the law. Our annual meetings differ in many respects from those of other national bodies. We do not come here alone for pleasure and companionship and good times. We do not come here alone for the purpose of advancing the interests of the members of our profession. We come here as guardians of the common good and trustees for the common weal.

"We come here, by our common, joint and individual studies and efforts, by open and free discussion, to improve the administration of justice, to make it indeed the instrumentality—the essential instrumentality—of government of free men and by free men."

President Willis Smith then delivered the Annual Address which features the opening session. His subject was "War's Aftermath in Law". It was published in full in our December issue (page 841).

Resolutions Are Offered from the Floor

Pursuant to the Association's Constitutional plan (Article IV, Section 3), an opportunity was then given to any member to offer a Resolution from the floor, for reference to, hearing by, and report by, the representative Committee on Resolutions, with debate and vote at the "open forum" session of the Assembly.

Resolutions were offered by Kenneth Teasdale, of Missouri; James W. Ryan, of New York; Douglas Hudson, of Kansas; J. Cleo Thompson, of Texas; Murray Seasongood, of Ohio; Lawrence S. Apsey, of Massachusetts; James H. Hayes, of New York; Harry H. Meisner, of Michigan; George Washington Williams, of Maryland, and George C. Dix, of New York.

These Resolutions are set forth or summarized in connection with the Assembly's action on them at a later session.

Association's Endowment Holds Its Meeting

Proceedings of the Assembly were suspended at this point to permit the American Bar Association Endowment to hold its fifth annual meeting. Its President, Jacob M. Lashly, of St. Louis, took the chair and made a report of progress.

Mr. Lashly was unanimously re-elected a Director of the Endowment, for a five-year term.

Secretary Stecher announced the Resolutions Committee and its schedule for hearing the Resolutions offered from the floor:

Harold J. Gallagher, New York: *Chairman*
Harry Cole Bates, New York
Joseph F. Berry, Connecticut
Milo H. Crawford, Michigan
P. H. Eager, Mississippi
Donald A. Finkbeiner, Ohio
Guy B. Hazlegrove, Virginia
Phineas M. Henry, Iowa
Homer A. Holt, West Virginia
Earl King, Tennessee
Jacob M. Lashly, Missouri
Raymer F. Maguire, Florida
Robert F. Maguire, Oregon
B. Allston Moore, South Carolina
Alvin Richards, Oklahoma
Pearce C. Rodey, New Mexico
Frank E. Spain, Alabama
Frederick H. Stinchfield, Minnesota
Kenneth Teasdale, Missouri
Weston Vernon, Jr., New York
Francis E. Winslow, North Carolina

Membership Awards to Members of Junior Bar

President Smith announced that the Association's membership was at its all-time high, as it exceeded 39,000 and was approaching 40,000 with the applications being processed.

For the large part which the Junior Bar had played in bringing this about, prizes had been awarded to six members whose work had been especially productive. Four of these were to receive watches; two of them, pen-desk sets. These awards were then bestowed on Frank L. Seamans, of Pennsylvania; Theodore A. Kolb, of California; Charles W. Joiner, of Iowa; Bates Block, of Georgia; W. Arlington Jones, of Mississippi; and Frank Andrews, of New Mexico.

The recipients were heartily applauded for their efforts, as was William R. Eddleman, of Washington, hard-working Chairman of the Junior Bar Conference's Membership Committee. Mr. Eddelman was given a personal token of appreciation, by President Smith.

Assembly Delegates to the House Are Nominated

Nominations for the election of four Delegates from the Assembly to the House of Delegates, for a two-year term, were then proceeded with. The nominees were Lyman M. Tondel, Jr., of New York; William J. Jameson, of Montana; James A. Markle, of Michigan; Robert G. Storey, of Texas; William Hargest, of Pennsylvania; John Kirkland Clark, of New York; William Nathan MacChesney, of Illinois; and James R. Morford, of Delaware.

The voting was by printed ballots and ballot boxes, with an opportunity for all members present in Atlantic City to vote.

Sir Norman Birkett, of England, the Honorable E. K. Williams, K. C., of Canada, Senator Forrest C. Donnell, of Missouri, and Judge John J. Parker, of North Carolina, were presented informally to the Assembly audience and were acclaimed with applause.

The Assembly rose and stood in silent tribute to the revered memory of John Howard Voorhees, of South Dakota, for many years the diligent and devoted Treasurer of the Association, who died shortly before this meeting.

Although all of the States and other jurisdictions or units of geographical representation in the House of Delegates (aside from the territorial groups) had accredited Delegates present who were registered for attendance in the House, the State Delegate from each Arkansas, Delaware, Hawaii, Indiana, Maryland, Missouri, and Puerto Rico, had not registered before 12 o'clock on this opening day of the meeting. Their places accordingly being vacant, the representation of their constituencies was brought about in the manner provided for in the Association's Constitution; viz., the members of the Association present from those States held meetings and chose a temporary State Delegate.

The opening session of the Assembly adjourned at 12:20 o'clock.

ASSEMBLY: SECOND SESSION

■ The Monday evening session of the Assembly was convened at 8:45 o'clock, in the Convention Hall.

President Willis Smith introduced as the speaker Mr. Justice Robert H. Jackson, of the Supreme Court of the United States, who had been Chief Prosecutor at the Nuremberg trial of Nazi war criminals. President Smith told of the acclaim with which this American jurist had been received in Europe.

Mr. Justice Jackson was greeted with prolonged applause and listened to with the closest interest, as he spoke concerning "Lawyers Today: The Legal Profession in a World of Paradox." His address was published in our January issue (page 24).

ASSEMBLY: THIRD SESSION

■ As usual, the Assembly session devoted principally to the debate and dispatch of Association business was that convened on Wednesday morning, at Convention Hall.

The Assembly first gave an ovation to Senator Pat McCarran, of Nevada, Chairman of the Senate Committee on the Judiciary, who had been sponsor and champion of the Administrative Procedure Act and other remedial legislation in which the Association was greatly interested. Speaking on "Improving Administrative Justice", the distinguished Nevada lawyer, a member of the Association, gave an authoritative statement of the legislative intent in drafting and enacting the Administrative Procedure Act. His address was published in full in our December issue (page 827).

Awards in Appreciation of Signal Public Services

President Smith then presented Association certificates of award, in appreciation of notable public services in connection with the drafting and enactment of the Administrative Procedure Act (See, also, page 906 of our December issue). The ten receiving the awards were:

WARREN R. AUSTIN, formerly Senator from Vermont; now United States Delegate to the Security Council of The United Nations

TOM C. CLARK, The Attorney General of the United States

CALVIN CORY, Clerk, Committee on the Judiciary, United States Senate

HOMER CUMMINGS, former Attorney General of the United States

JOHN W. GWYNNE, member of the Subcommittee on Administrative Procedure, in the Committee on the Judiciary, House of Representatives

CLARENCE E. HANCOCK, member of the Committee on the Judiciary, House of Representatives

PAT MCCARRAN, Chairman of the Committee on the Judiciary, United States Senate

HOWARD W. SMITH, Member of Congress from Virginia

HATTON W. SUMNERS, Chairman of the Committee on the Judiciary, House of Representatives

FRANCIS E. WALTER, Chairman of the Subcommittee on Administrative Procedure, in the Committee on the Judiciary, House of Representatives

The Assembly audience acclaimed most heartily the distinguished recipients and the bestowal of these tokens of the Association's appreciation of signal public services well performed.

Open Forum as to Rules of Civil Procedure

In the absence of Chairman Thomas B. Gay, of the Committee on Jurisprudence and Law Reform, who had been called from Atlantic City by urgent professional business, John G. Buchanan, of Pennsylvania, presided over the "open forum" session as to the proposed amendments of the Federal Rules of Civil Procedure. He paid a stirring tribute to the first speaker, Former Attorney General William D. Mitchell, Chairman of the Advisory Committee on the Rules, and to the work of that Committee.

Chairman Mitchell made an illuminating statement as to the filed amendments. He made it clear that the subcommittee's draft of a "condemnation" rule (32 A.B.A.J. 625) had not been before the full Committee and that the Committee welcomed advice, criticisms, and suggestions as to it. He gave the history of the Committee's efforts to develop, in the light of the conflicting judicial decisions, an amendment to accomplish the proper "protection of investigation files". He declared that "If any of you can draft a better provision, we would like to have it."

Former President Walter P. Armstrong, of Tennessee, in opening the discussion, complimented the Advisory Committee and its Chairman on "the fine job in general the Committee has done". He discussed analytically the two matters principally under discussion.

James W. Ryan, of New York, spoke in opposition to the amendment as to "investigation files". Clarence W. Beatty, Jr., of Illinois, gave his views and experience as to the "condemnation" rule. Wilber E. Benoy, of Ohio, opposed the Committee's proposal as to "investigation files". Former President Charles A. Beardsley, of California, commented unfavorably on the "condemnation" rule. Charles J. McCarthy, of Tennessee, Assistant General Counsel of the TVA, replied to Mr. Armstrong's strictures as to the exemption of the TVA from the requirement of a jury trial in condemnation cases. In closing, Chairman Mitchell defended the Advisory Committee's efforts as to "investigation files" and denied that there was any purpose to broaden adversary access to them.

The "open forum" and the session, which had been highly informative to the members present, adjourned at 12:30 o'clock.

ASSEMBLY: FOURTH SESSION

■ At the opening of the Thursday morning session, Secretary Stecher read the report of the tellers who counted the ballots cast for Assembly Delegates. The following were shown to have been elected:

JOHN KIRKLAND CLARK, of New York

W. J. JAMESON, of Montana

JAMES R. MORFORD, of Delaware

ROBERT G. STOREY, of Texas

The Awards of Merit to Bar Associations for "the most constructive and outstanding work during the year" were presented by Charles O. Rundall, of Illinois. The Lake County (Ohio) Bar Association received the award to a small local Bar Association; the Association of the Bar in the City of New York, the award to a large local Association; with honorable mention to the Essex County (New Jersey) Bar Association, the Dayton (Ohio) Bar Association, and the Cleveland (Ohio) Bar Association, the last named being already a three-time winner.

The award to a State Association was bestowed on the State Bar of California, with honorable mention to the Iowa Bar Association and the New York State Bar Association.

William Fitzgibbons, Director of the National Organization Division of the Treasury Department, presented that Department's Certificate of Commendation and citation, to the Association and "to every Bar Association throughout the United States and each individual member," for services in connection with the sale and purchase of war bonds. To President Smith he presented the Treasury's Silver Medal "for outstanding patriotic services" in the same connection. President Smith made a fitting response.

Amendments of the Constitution and By-laws

Chairman Tappan Gregory, of the House of Delegates, presented *seriatim* to the Assembly the various amendments of the Constitution and By-laws of the Association, which had been duly filed and published

and had been approved by the House of Delegates.

These were duly adopted by the Assembly, with many more than the required number of members present. Their text is given in the Proceedings of the House of Delegates, elsewhere in this issue.

Report and "Open Forum" as to Resolutions

For the Resolutions Committee, Chairman Harold J. Gallagher, of New York, reported on the many Resolutions offered by members from the floor, on the opening day of the Assembly. The Committee had held two public hearings on the Resolutions, before preparing its report.

Resolution No. 1, by Kenneth Teasdale, of Missouri, was reported favorably by the Committee. It read as follows:

WHEREAS, the Declaration accepting on the part of the United States compulsory jurisdiction of the International Court of Justice and providing that the Declaration should not apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States, contains the further limitation that decision as to what matters are essentially within the domestic jurisdiction of the United States shall be "as determined by the United States", and,

WHEREAS, the Statute of the International Court of Justice, Article 36, paragraph 6, provides that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court, and,

WHEREAS, this limitation leaves to a party to a dispute, rather than to the Court, the right, in certain circumstances, to determine the jurisdiction of the Court, and,

WHEREAS, the limitation, furthermore, tends to defeat the purpose it is hoped to achieve by means of the Declaration, and invites similar reservation by other nations, with attendant confusion, doubt and possible frustration,

NOW, THEREFORE, BE IT RESOLVED: that the Senate of the United States should reconsider the subject of the Declaration of compulsory jurisdiction, and should eliminate therefrom the right of determination by the United States as to what constitutes matters essentially within the domestic jurisdiction, and,

BE IT FURTHER RESOLVED: that a copy of this Resolution be sent to the President of the United States, the Secretary of State, and the members of the Senate Committee on Foreign Relations.

Mr. Teasdale spoke earnestly in favor of his Resolution, which was adopted by the Assembly (See, also, 33 A.B.A.J. 874).

Adversary Access to "Investigation Files"

Resolution No. 2 had been offered by James W. Ryan, of New York, as follows:

WHEREAS the present practice of Discovery in actions at law was inaugurated in the year 1883 by the British Rules issued pursuant to the modern reform in Court procedure and practice known as the Judicature Acts; and

WHEREAS thereafter Discovery remained non-existent in the Federal Courts of the United States, and in practically all of the State Courts of the United States, until adoption in the year 1938 of the Federal Rules of Civil Procedure as to Discovery which are substantially identical with the British Rules; and

WHEREAS, at the time of such adoption of the Federal Rules the British Rules had acquired a settled interpretation by numerous decisions of the British Courts fixing the reasonable and necessary limits of Discovery, and the American Bar Association when approving and recommending adoption of those Federal Rules intended that such limits should be preserved; and

WHEREAS ever since the year 1938 the Federal Courts throughout the United States, with slight and negligible exception, have observed the limits of Discovery as so fixed by settled interpretation by the British Courts; and

WHEREAS it is a general and sound principle of law that where a Rule having the force of statute has been previously adopted in another jurisdiction, it is to be interpreted in accordance with the settled interpretation made by the Courts in such other jurisdiction, because the Rule or statute "generally is presumed to be adopted with the construction which it has received", (Mr. Justice Holmes in *James* v. *Appel*, 192 U. S. 129, 135); and

WHEREAS on August 26, 1946, the Advisory Committee appointed by the Supreme Court of the United States proposed an Amendment to Rule 30(b) of the Federal Rules, which Amendment is ambiguous and perhaps susceptible of an interpretation that Discovery should go beyond the limits so fixed by settled interpretation by the British and American Courts;

BE IT RESOLVED, That the American Bar Association in Annual Convention assembled, disapproves said amendment to Rule 30(b) of the Federal Rules proposed by said Advisory Committee.

Chairman Gallagher stated that the Committee had conferred with Mr. Ryan and that he had agreed to an amendment of the Resolution by adding:

RESOLVED, Further, That the matter be referred to the Committee on Jurisprudence and Law Reform for further action and in cooperation with the Advisory Committee of the Supreme Court on Federal Rules of Civil Procedure.

As so amended, the Committee recommended that the Resolution be adopted, "not thereby intending to adopt all the recitals to which the Committee has not given complete consideration, but has confined its recommendation to the Resolutions as proposed and as the Committee has suggested its amendment".

Action as to Proposed Rule 30(b) Is Debated

George L. DeLacy, of Nebraska, proposed to strike out the provision for reference to the Committee on Jurisprudence and Law Reform, restoring the Resolution to its original form. Mr. Ryan spoke in advocacy of his Resolution. For the Resolutions Committee, Robert F. Maguire, of Oregon, explained the reasons for the Committee's amendment, in the interests of the Association's participation in developing an appropriate provision in the Rules. Walter P. Armstrong expressed the view that the Association ought not to disapprove the proposed Rule but should merely vote the reference. Wilbur Benoy, of Ohio, favored condemnation of the proposed Rule.

Mr. DeLacy's amendment was defeated, by a vote of 73 for and 215 against. The Resolution as reported by the Resolutions Committee was then adopted by the Assembly. Later its "recital" clauses were

stricken out by the House, with the later concurrence of the Assembly.

Address by Sir Hartley Shawcross of England

President Smith then asked Former Attorney General Francis Biddle, of Pennsylvania, American member of the Tribunal at Nuremberg, to introduce to the Assembly the gifted young Attorney General of England and Wales, Sir Hartley Shawcross. Judge Biddle was himself warmly greeted by the Assembly, as he paid an eloquent tribute to the Association's distinguished guest.

The latter's address, which made a profound impression, was published in full in our January issue (pages 31-35).

Report and Voting as to Resolutions Are Resumed

Chairman Gallagher next reported on Resolution No. 16, offered by Michael Francis Doyle, of Pennsylvania, as follows:

> RESOLVED, That the American Bar Association condemns the trial of Archbishop Stepinac of Yugoslavia as an attempt to use judicial processes for the purpose of destroying religion and to request our Government and The United Nations to vigorously protest the same.

Chairman Gallagher stated that "The Committee believes that the subject-matter of the Resolution is beyond the scope and purposes of the Association, and therefore recommends that the Resolution be not passed."

This recommendation was adopted by the Assembly.

Resolution No. 9, presented by Harry H. Meissner, of Michigan, favored income tax relief for war veterans in lieu of a bonus. The Committee recommended that this Resolution be not adopted, "because it is not within the scope of the objects and purposes of the Association". This recommendation was adopted.

Concerning Resolution No. 15, submitted by George C. Dix, of New York, Chairman Gallagher said that "The subject-matter of the Resolution would require investigation of the facts. It relates to the alleged detainment in the United States, and the internment, of hundreds of residents of the Latin-American Republics; and the Resolution asks that the American Bar Association strongly condemns the denial of civil rights in said cases, and recommends, now that hostilities are over, that these internees be promptly released and allowed to return to their respective homes and families in Latin-America. Mr. Dix agrees that it would require investigation before this Assembly could act upon it, and the Committee proposes to refer this Resolution to the Section of International and Comparative Law."

The Committee's recommendation was adopted by the Assembly.

Resolutions as to Decisions of the Supreme Court

Resolution No. 10, by George Washington Williams, of Maryland, dealt generally with the policy of the decisions of the Supreme Court of the United States in connection with permitting tax payers to challenge the validity of certain types of legislation. Resolutions No. 11 and No. 12, also by Mr. Williams, dealt in general terms with the subject of jurisdiction assumed and exercised by the Federal Courts in connection with the regulation of commerce among the several States and with foreign nations. "They present in argumentative terms," the Committee said, "certain attitudes and policies with which the Assembly would manifestly not be qualified to deal without more particular specification."

Resolution No. 13, also by Mr. Williams, referred to general welfare clauses of the Constitution and consisted of a brief exposition of a policy of interpretation and philosophical comments upon the construction of federal laws by Courts. "These seem to your Committee not to present a point or issue specific so as to be susceptible of any constructive action by the Assembly," said Chairman Gallagher.

Resolution No. 14, also by Mr. Williams, consisted of a statement of political policy on the subject of poll tax legislation and suffrage qualifications which the Committee said "would require clarification and study in order to ascertain whether any problem is presented which would be within the competence or jurisdiction of the Assembly to consider or take action upon."

The Committee therefore recommended unanimously that Resolutions Nos. 10, 11, 12, 13 and 14 be referred to the Standing Committee on Jurisprudence and Law Reform "for their consideration and such action as they may see fit to take in reference thereto." This was voted by the Assembly.

Resolution No. 8, by Mr. James H. Hayes, of New York, read as follows:

> BE IT RESOLVED, That all annual meetings of this Association be opened by an offering of Prayer to God.

The Resolutions Committee recommended that the matter be referred to the Board of Governors, which is charged with arrangements for meetings and programs. This was voted by the House.

Resolution No. 5, by Murray Seasongood, of Ohio, read as follows:

> By U. S. Code, Section 54 (a), the U. S. Code of Laws of the United States is, with certain limited exceptions, made *prima facie* the laws of the United States and the Statutes at Large are actual law. The U. S. Code was enacted in 1926, and enough time has elapsed to discover possible errors and inconsistencies. Locating statutes in the Statutes at Large and citing them is inconvenient and time-consuming.
>
> RESOLVED, therefore, it is the sense of the American Bar Association that the U. S. Code should be enacted into actual law of the United States as State Codes are enacted; and further
>
> RESOLVED, That the Congress be so informed.

The Committee recommended that this be referred to the Committee on Jurisprudence and Law Reform. Mr. Seasongood moved as a substitute that the Resolution be approved and referred to that Committee for implementation. After debate and a division, the substitute was declared to be adopted.

Resolution No. 6, also by Mr.

Seasongood, was withdrawn by him until 1947.

Lawyers and "On-the-Job" VA Training

Resolution No. 3, by Douglas Hudson, of Kansas, and Resolution No. 4, by J. Cleo Thompson, of Texas, proposed that the Association "disapprove as discriminatory the exclusion of young lawyers from the benefits of on-the-job training by the Veterans Administration."

Chairman Gallagher reported that "The Committee is informed that, under the terms of a policy letter issued by the Veterans Administration, submitted with Mr. Thompson's Resolution, relating to veteran members of the professions, there appears to be no discrimination against lawyers. The policy, as announced by the Veterans Administration, applies equally to the professions of medicine, teaching, law and theology. When a veteran has completed his training as a physician and is licensed to practice medicine in his State, when a veteran has received a teaching certificate from a State, when a veteran has been ordained for the ministry as a clergyman, and when a veteran has been recognized by the State as qualified to practice law, the veteran in each case is regarded as having attained the objective of his profession.

"In each case, the veteran is permitted to continue his training by advance or refresher courses but is not permitted to practice his profession under his license and receive on-the-job compensation. The Committee can see no discrimination against the lawyer in this policy."

The Committee therefore recommended that Resolutions Nos. 3 and 4 be not passed. This was adopted by the Assembly.

Resolutions as to World Government

The last Resolution (No. 7) reported for action was by Lawrence S. Apsey, of Massachusetts, and Paul D. Thatcher, of Utah, and was as follows:

> WHEREAS, the devastations and untold sorrow produced by two World Wars have demonstrated that peace cannot be maintained through preparations by individual nations for defense against war and that enduring peace can be attained only through the establishment of justice administered according to law on a basis that will eliminate resort to war for the settlement of international disputes; and
>
> WHEREAS, the United Nations Organization is a step in the direction of a federation of nations with limited delegated powers providing the minimum of centralized control in international affairs and the maximum of self-government in national affairs; and
>
> WHEREAS, in order to preserve the unity between the nations of the world so far attained through the United Nations Organization, it is necessary to support the present Charter but at the same time keep unceasingly in view the objective of the development of the United Nations into an effective world government, to that end
>
> BE IT RESOLVED that the American Bar Association affirms its belief in the following principles:
>
> 1. World peace must rest upon the solid foundation of justice administered according to law.
>
> 2. An effective world government under law should have judicial, legislative and executive branches; the delegated powers should be limited, specific and clearly defined, with prohibition against intervention in matters which are essentially within the domestic jurisdiction of any nation; and the laws should provide for regulation and control of atomic energy and all means of aggressive warfare;
>
> BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the President and each member of the Senate and House of Representatives of the United States, and to each of the delegates of the United Nations Organization from all of the nation members of said organization.

Majority and Minority Reports Are Offered

The majority in the Resolutions Committee reported as follows:

"Last year a Resolution of substantially the same import was presented to this body. You decided that the matter be referred to the Section of International and Comparative Law and that a report be made to the House of Delegates and to the Assembly. The Section has made its report to the House of Delegates, expressing itself that action on such a Resolution is not timely. The Resolutions Committee, one of temporary personnel, therefore submits the resolution now before you without recommendation."

A minority report by Francis E. Winslow, of North Carolina, Robert F. Maguire, of Oregon, and Chairman Gallagher, favored adoption of Resolution No. 7, with the following amendments:

The second paragraph to be amended to read:

> WHEREAS, the United Nations Organization is a momentous advance toward and provides machinery essential for a federation of nations with limited delegated powers providing the minimum of centralized control in international affairs and the maximum of self-government in national affairs;

The second paragraph of the Resolution to be stricken and the following substituted therefor:

> That the United States Government should take the lead in and support a movement to enlarge powers of The United Nations to prevent war and to eliminate the causes of war by investing The United Nations with power to enforce, enact, and interpret laws to prevent individuals and Nations from waging war, in such manner as justly takes into account the principle of weighted representation without impinging on the sovereignty of any nation any more than absolutely necessary to preserve peace.

Mr. Winslow moved the adoption of the minority report. Despite a request from President Smith "to be brief," Mr. Aspey spoke at length for the Resolution as the minority report would amend it.

Ross Essay Prize Is Presented to Eugene C. Gerhart

President Smith interrupted the debate to present the Association's Certificate of Award, and a $3,000 check, to Eugene C. Gerhart of Binghamton, N. Y., as the winner of the 1946 Ross Essay Prize, for the best discussion of "Labor Disputes: Their Settlement by Judicial Process". The young winner (see 32 A.B.A.J. 655) was warmly greeted. He spoke briefly in summary of his essay, which was printed in full in

our November issue (page 752).

President Smith announced the subject of the 1947 Ross Essay Contest, which has been published in each the December and January issues of the JOURNAL.

Former Judge Floyd E. Thompson, of Chicago, spoke briefly to acquaint the members with the current work of the American Law Institute.

Debate on the Apsey-Thatcher Resolution Is Resumed

Julius Applebaum, of New York, referred to the "carefully prepared set of Resolutions" which the House of Delegates adopted the day before. Mr. Winslow continued the argument for his motion to adopt the minority report.

Former Judge Floyd E. Thompson, of Illinois, raised the question of a quorum, saying that because of the lateness of the hour (past 1:00 o'clock), few more than fifty members remained in the hall, out of a morning attendance of more than a thousand. He thought that so few members ought not to decide so important a question, and moved that the matter be referred to the Section of International Law.

A Point of Order as to "Quorum"

President Smith discussed the point of order as to the absence of a quorum. Section 1 of Article IV, of the Association's Constitution does not specify any number of members as required for the presence of a quorum in the Assembly. About fifteen hundred members were registered as in Atlantic Ctiy; seventy-six of them were then in the meeting. He thought that the presence of a majority of those registered was required for an Assembly quorum.

This ruling was discussed by several members. Judge Thompson withdrew his point of order. Arrangements were discussed for an Assembly session during Friday forenoon.

At 1:45 o'clock, the fourth session of the Assembly voted to adjourn.

ASSEMBLY—FIFTH SESSION—THE ANNUAL DINNER

■ The Annual Dinner of the Association was a brilliant assemblage, in the ballroom of Convention Hall. The presence of many distinguished guests from other lands (See 32 A.B.A.J. 860) gave it an added significance and zest.

President Smith introduced Former Attorney General Homer S. Cummings, of Connecticut and Washington, D. C., as a lawyer and leader who had greatly aided the Association's objectives. Mr. Cummings felicitously bestowed the Association's Gold Medal for conspicuous services to jurisprudence, on Carl McFarland (see 32 A.B.A.J. 837), who responded briefly.

The Honorable E. K. Williams, K. C., Immediate Past President of the Canadian Bar Association and its Delegate in Atlantic City, delivered a challenging but inspiring address "Whither?". It was published in our January issue (page 10).

His Excellency, Lord Inverchapel, the British Ambassador in Washington, made a brief and most felicitous speech in response to the Association's greeting.

Introduced by Judge John J. Parker, of North Carolina, the next speaker was Sir Norman Birkett, of the High Court of England, the eloquent Briton whose return to America and an Association meeting was most warmly welcomed. Sir Norman's stirring address in behalf of international law will be published in the JOURNAL as soon as his revision of his manuscript is received.

Dr. Ivan Kerno, of Czechoslovakia, Assistant Secretary General of The United Nations (Legal Section), was presented as the spokesman for the distinguished representatives of The United Nations present on the dais. Dr. Kerno's earnest remarks made a strong impression. They were published in full in our December issue (page 839). Other representatives of The United Nations were introduced and heartily greeted.

As the climax of the evening, Incoming President Carl B. Rix was introduced. He spoke briefly, and assured Dr. Kerno that the Association will cooperate to the utmost in the work in behalf of international law. The dinner was ended at 12:10 o'clock.

ASSEMBLY: SIXTH SESSION

■ The sixth and concluding session of the Assembly was convened at 12:15 o'clock on Friday afternoon, to work against time and to accomplish the scheduled adjournment.

Secretary Stecher reported that the House had deferred to its mid-year meeting its action on Resolution No. 1, by Mr. Teasdale, of Missouri, as to the World Court. The action of the Assembly therefore stood as the expression of its opinion (32 A.B.A. J. 873).

Resolution No. 2, by James W. Ryan, of New York, had been amended by the House, to the extent of deleting the "whereas" clauses, etc. The amended text of the Resolution as adopted by the House is published in its Proceedings elsewhere in this issue. Mr. Stecher moved that the Assembly concur in the House action in adopting Resolution No. 2 as amended.

After the question had been put and the motion carried, Mr. Ryan sought to obtain the floor to debate the matter. President Smith declined to recognize him for the purpose, on the ground that the Resolution had been fully debated and considered in each the Assembly and the House and that time was lacking for further discussion. Mr. Ryan appealed spiritedly from the decision of the Chair. A lively episode followed; the Assembly sustained the ruling. Mr. Ryan tried to make a motion for a referendum vote of Association members by mail. President Smith ruled this out of order and was sustained, on Mr. Ryan's appeal. Mr. Ryan's Resolution accordingly stood as adopted in the form to which it was amended in the Assembly, but without its elaborate recitals.

Palmer Hutcheson, of Texas, and Paul D. Thatcher, of Utah, were recognized to speak briefly in behalf of "world government now". This was accorded in view of the curtailment

of debate at the end of the long session in the Assembly the day before. Mr. Hutcheson moved that the Assembly concur in the action of the House in deferring its consideration of the Fyke Farmer and Winslow Resolutions on the subject until the mid-winter meeting, and referring the Resolutions meanwhile to the Section of International Law. This was voted by the Assembly.

Kenneth Teasdale, of Missouri, next moved, as to his Resolution (No. 1), that "this Assembly concur in the action of the House in deferring it until the next session of the House, for the consideration of the Special Committee of which Judge Ransom is Chairman". This was carried by vote of the House.

New Officers of the Association Are Inducted

There being no unfinished or further business, the usual concluding joint session of the Assembly and the House ensued. President Smith introduced first the three newly elected members of the Board of Governors: William Clarke Mason, of Pennsylvania; Cody Fowler, of Florida; and Loyd Wright, of California. Then the new Chairman of the House of Delegates, Howard Barkdull, of Ohio, was presented, and also Secretary Stecher and Treasurer Walter M. Bastian. All were greeted with hearty applause.

President Smith introduced Incoming President Carl B. Rix, of Wisconsin, and turned over to him the historic gavel symbolic of the leadership of the Association. The members present arose and cheered, in tribute to their friendship and fealty to President Rix. The latter thanked the Assembly for the honor and stated his awareness of the obligation put on him. "After five wartime years", he said, "this institution seems to be bursting its seams, in the desire of every Section and Committee to work".

Beyond that, President Rix referred the members to the "induction statement" which he had prepared for the November JOURNAL (pages 723-724). "I shall let that stand as what I would have said to you here today if there had been time", he said.

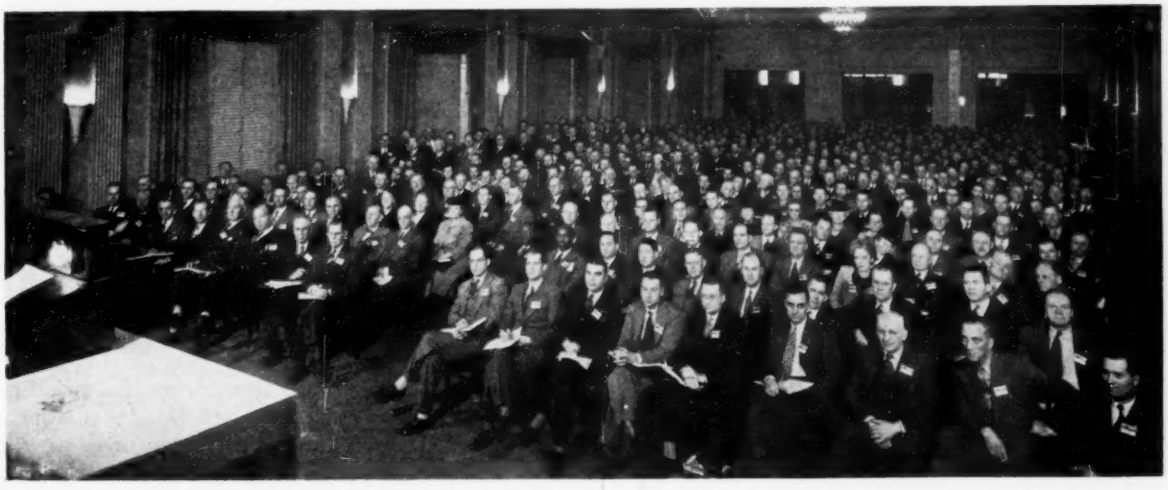
Secretary Stecher moved "that the Assembly of the Sixty-ninth Annual Meeting of the American Bar Association express its deep appreciation of the courtesy and hospitality which has been accorded us at this meeting by our generous hosts, the Atlantic City Bar Association, and the New Jersey State Bar Association." This was greeted with hearty applause, and was adopted unanimously.

The Assembly thereupon voted to adjourn, at 12:25 o'clock Friday afternoon.

Iowa State Bar Association

■ More than 700 lawyers crowded into the grand ballroom of the Hotel Fort Des Moines on December 12, 13 and 14, to attend the three-day sessions of the Seventh Annual Tax School held in Des Moines by the Iowa State Bar Association. This was more than one-third of the Association's membership and was the largest attendance in the history of this highly successful Tax School. It is believed in Iowa that this Tax School is the only one of its kind at present functioning in the Bar organizations in the United States. A large number of those present were lawyers who have returned from serving in the Armed Forces. The discussions were planned to give them the latest developments in the law and the procedure of taxation and also the fundamental structures of federal and State taxation.

The Annual Tax School Dinner was held on the evening of December 13, with Carl B. Rix, President of the American Bar Association, as the speaker.



Seventh Annual Tax School

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House of Delegates:

Proceedings at the 1946 Annual Meeting

■ As has become customary, the opening session was devoted largely to Association business and organizational matters. A Standing Committee on Public Relations was created, by an amendment of the By-laws, and a Director of Publicity for the Association was authorized. Detailed reports as to Association finances were given by Treasurer Walter M. Bastian and Chairman William J. Jameson, of the Budget Committee. An increase in revenues was shown, but also a substantial increase in operating costs and required outlays. Amendments of the Association's Constitution were approved on the recommendation of the Rules and Calendar Committee, to increase the number of Assembly Delegates to the House, provide a constitutional basis for Regional Meetings with power to adopt resolutions, and change the representation of the Sections in the House. The requirements as to resolutions offered in the Assembly by members from the floor were made more explicit. Various amendments of the By-laws and of the Rules of the House were adopted; and a multi-sponsored amendment to authorize that the amount of membership dues in the Association shall be fixed, and may be changed, by the House upon the recommendation of the Board of Governors, was considered. Its purpose was stated to be to enable an increase in the amount of the dues, if that is necessitated by the increases in operating costs and by the expansions in scope and costs of the Association's work.

First Session

■ The opening session of the Annual Meeting of the House of Delegates was convened in the Grand Ballroom of Convention Hall, in Atlantic City, New Jersey, at 2:15 o'clock on Monday afternoon, October 28, 1946, with President Willis Smith, of North Carolina, in the Chair. The roll call by Secretary Joseph D. Stecher, of Ohio, showed an attendance of 154, with every jurisdiction except Hawaii, Puerto Rico and the Territorial Group represented.

Chairman Robert R. Milam, of Florida, presented the report of the Committee on Credentials and Admissions, which showed the following changes in the office of accredited delegates to the House since the meeting last July:

EDMUND C. WINGERD, Pennsylvania Bar Association

HERBERT A. MACKOFF, State Bar Association of North Dakota

STEPHEN SCHMITT, Minnesota State Bar Association

STEPHEN E. HURLEY, Chicago Bar Association

Approval of the report was voted by the House.

Report of President Smith

In reviewing the activities in which the Association engaged during the past year, President Smith listed the following as among those of major importance:

Passage by the Congress of the Administrative Procedure Bill (32 A.B.A.J. 325).

Creation and organization of the Section of Administrative Law (32 A.B.A.J. 451) and the Section of Labor Relations Law (32 A.B.A.J. 91, 479).

Assistance extended by the Association in securing the passage by the Senate of S. R. 196, providing for an acceptance by the United States, of the compulsory jurisdiction of the World Court (32 A.B.A.J. 542).

Creation of the Special Committee on the Judiciary (32 A.B.A.J. 494).

Addition of approximately 5,000 new members to the rolls of the Association, largely through the efforts of the Membership Committee and the Junior Bar Conference.

At the conclusion of his report, which was acclaimed by the House, President Smith relinquished the gavel to its Chairman, Tappan Gregory, of Illinois.

Secretary Stecher announced the following nominations for members of the Board of Governors, which had been made pursuant to Article VIII, Section 1, of the Association's Constitution, on July 2:

Third Circuit: WILLIAM CLARKE MASON, of Pennsylvania

Fifth Circuit: CODY FOWLER, of Florida

Ninth Circuit: LOYD WRIGHT, of California

A motion was made and carried that the Secretary cast a unanimous ballot for the nominees. This was done.

Report by the Board of Governors

Secretary Stecher announced two changes in the Board of Governors since its last report to the House. William L. Ransom, of New York, became a member *ex officio* by virtue of his election as Editor-in-Chief of the JOURNAL, to succeed Edgar B. Tolman, resigned. By vote of the President of the Association and the members of the House of Delegates from the Seventh Circuit, pursuant to Article VI, Section 1, of the Constitution, Harold H. Bredell, of Indiana, was elected to fill the vacancy caused by the resignation of Eli F. Seebirt, of Indiana.

"Continuing its study of the headquarters office," Mr. Stecher said, "the Board received and approved a report from the firm of Peat, Marwick, Mitchell & Company which recommended the installation of certain new equipment and extensive improvements in office procedure and administration, in order to make the available facilities and personnel of more effective service to the Association.

"Approval was given to a continuation of the Traffic Court program and a subcommittee was authorized to contact the Automotive Safety Foundation with reference to a renewal of its grant for this work during the coming year. Upon recommendation of this subcommittee, the Board directed that the Traffic Court program be carried on under the jurisdiction of the Section of Judicial Administration.

"The President was authorized to appoint a committee, composed of members of the Board and representatives of the Section of Legal Education and Admissions to the Bar, to confer with the Carnegie Corporation with respect to providing a portion of the funds required for the survey of the legal profession approved by the House at its July, 1946, meeting (32 A.B.A.J. 460).

"This Committee was authorized to commit the Association to an expenditure of $50,000, or one-half of the cost of the survey, whichever amount is the lower, to be paid over a period of five years. It subsequently reported that, subject to action by the Board of Trustees of the Carnegie Corporation, it appeared reasonably certain that the latter would finance the remaining cost of the survey. The Committee also submitted a recommendation, which was approved by the Board, that the President be authorized to appoint a Council, to consist of not less than seven nor more than eleven distinguished persons, the Council to select a director of the survey and to continue in an advisory capacity until the survey is completed.

"Thomas B. Gay, of Virginia, was reelected for a term of five years as a member of the Board of Editors of the JOURNAL.

" 'How Can International Legislation Best Be Improved—By Multipartite Treaties or by Giving Powers to the General Assembly of the United Nations' was selected as the subject of the 1947 Ross Essay Contest.

"Approval was given to an increase in the dues of the Section of Real Property, Probate and Trust Law from $1.00 to $2.00 per year. Approval was given also to amendments of the By-laws of the Section of Insurance Law, which will be effective only when presented to and approved by the House."

The report of the Board of Governors was adopted by the House.

Committee on Public Relations Is Created

The report of the Special Committee on Public Relations, containing four recommendations, was presented by Chairman George Maurice Morris, of the District of Columbia. Recommendation No. I was offered in an amended form:

RESOLVED, That the Assembly and the House of Delegates of the American Bar Association adopt the following amendments to the By-laws of the Association:

A. Amend "Article X-Committees," Section I, by inserting immediately after line 20 the following:

On Public Relations, to consist of five elected members and, in addition, the President, the Chairman of the House of Delegates, a representative of the persons in charge of publishing the periodical or periodicals of the Association and the Director of the Public Information Program of the Junior Bar Conference, the latter four of whom shall be *ex-officio* members of the Committee.

The elected members of the Committee shall be selected and elected in the following manner: The President shall nominate the member or members of the Committee and such nomination, upon confirmation and approval by the Board of Governors shall then be submitted to the House of Delegates, and upon confirmation and approval by the House of Delegates shall thereupon become a member or members of the Committee for the term or terms designated.

The first elected members of the Committee shall be elected in the manner hereinabove provided, in 1946, for terms of 1, 2, 3, 4 and 5 years respectively, such terms to begin with the adjournment of the 1946 Annual Meeting of the Association and continue for the periods specified and until the successors of such members are elected. Thereafter, upon the expiration of each term, one member shall be elected each year for a term of five years. In the event of a vacancy in membership on the Committee, resulting from any cause other than the expiration of a term, a successor shall be appointed to the vacant membership, in the manner herein provided, only for the unfinished part of the unexpired term thereof.

B. Amend the By-laws of the Association "Article X-Committees", by inserting, directly after line 53, the following:

Section 13. Committee on Public Relations. The Committee on Public Relations shall prepare and report to the House of Delegates from time to time plans for advancing public acceptance of the purposes expressed in the Constitution of the Association as implemented by the House of Delegates. The Committee shall have the responsibility for giving effect to plans so presented which are approved by the House of Delegates, or, when the

occasion may require, by the Board of Governors.

A Director of Publicity Is Authorized

Recommendation No. II as offered by Mr. Morris was as follows:

RESOLVED, That the House of Delegates authorize the employment of a Director of Publicity upon such terms and conditions as shall be agreed upon by the Committee on Public Relations and the Board of Governors. The individual so employed shall have, subject to the approval and direction of the Committee on Public Relations, charge of and responsibility for contacts with news-disseminating and opinion-forming agencies and the releases thereto of official news respecting the American Bar Association. He shall perform such other functions in connection with public relations programs approved by the House of Delegates as the Committee on Public Relations shall deem to be advisable and shall direct.

Duties of the Committee on Public Relations Are Prescribed

Recommendation No. III submitted by Mr. Morris was as follows:

RESOLVED, That the Committee on Public Relations be directed to undertake at once, in cooperation with Sections, Committees and other agencies of the Association, the consideration and development of procedures to advance the public acceptance of the purposes which the Association is implementing through such Sections, Committees and agencies.

Recommendation No. IV as offered by Mr. Morris was as follows:

RESOLVED, That the Committee on Public Relations shall prepare, for presentation to the House of Delegates, plans for coordinating the efforts of all units of the organized Bar which are in agreement with the purposes expressed in the Constitution of this Association as implemented by the House of Delegates and which units are interested in advancing the public acceptance of those purposes and of objectives consistent therewith.

The four above resolutions as submitted were adopted by the House without debate.

The Treasurer Reports an Increase in Expenses and Revenues

The next business in order was the report of the Treasurer, Walter M. Bastian, of the District of Columbia. He asked particular attention to the results of a review of the office procedures at the Association's Headquarters, made by Peat, Marwick, Mitchell & Company, Certified Public Accountants. The Treasurer's report said in part:

> Since 1930, when the Association moved into its present building, the amount of work performed by the headquarters staff has greatly increased. This increase has been caused in part by a growth in membership—principally since 1941—but to a greater extent by an expansion of the number, scope and activities of the Sections of the Association. The increase in activity at headquarters is indicated by the figures in the following table.

COMPARISON OF MEMBERSHIP, ACTIVITIES AND HEADQUARTERS EMPLOYEES

Description	*June 30, 1930*	*June 30, 1941*	*Aug. 31, 1946*	*Per Cent of Increase Over 1930*	
				1941	*1946*
Membership	28,667	30,834	37,299	8	30
Number of Sections	7	13	15	85	114
Number of Section Committees	25	135	217	440	770
Official Family (Officers, Committee Members, etc.)	300	2,500	3,000	730	900
Items Mailed from Headquarters per year (Approximate)	50,000	150,000	200,000	200	300
Total Addressograph Impressions (Approximate)	400,000	650,000	800,000	60	100
Permanent Employees Headquarters	15	31	21	107	40

The growth in the number of Sections does not tell the entire story of Section development and activity, for many Sections have been sub-divided into several "divisions", each having substantially a complete organization. This is reflected in the number of Section committees, and in the roster of officers, members of Association committees, or Section committees, known as the "Official Family." These are the members with whom the headquarters staff has more than routine contact, accounting for much of its non-routine work.

It should be noted that the addressing equipment now in use was installed in 1930, and has not been substantially changed since that time. The number of office employees, which had increased until 1941, to handle the increased activity, has declined since that time principally because of the war-time help shortage, while the volume of work has continued to increase. Since the average member has no knowledge of the amount of work which must be regularly performed in the headquarters office, new officers and Section officers initiate mailing campaigns or other activities which at times are physically impossible to handle under present conditions.

Increased Demands on the Headquarters Staff

"Among the recommendations made by the firm of Peat, Marwick, Mitchell & Co.", said Treasurer Bastian, "are the installation of a modern accounting machine, increase in personnel, establishment of a separate dues record, and the acquisition of additional permanent office space. Recommended also is the appointment of an experienced office manager to assume responsibility for the supervision of all routine and semi-routine office operations under the direction of the Executive Secretary, thus leaving the Executive Secretary free to perform more important duties. The report has the wholehearted support of the headquarters' staff and the recommendations of the accounting firm have been approved by the Board of Governors and will be put into operation as soon as equipment and adequate personnel can be obtained.

"It is only fair to state, however, that had it not been for the loyal and unselfish devotion of the headquarters staff, the work of the Association would have seriously bogged down. It is, however, perfectly obvious that the present situation must be remedied and that unnecessary sacrifices should not be asked of the staff. It is estimated that the new machines will not be available until the beginning of our next fiscal year July 1, 1947, but every effort will be made to carry out the recommendations of the accounting firm at the earliest possible date."

Chairman Jameson Reports for the Budget Committee

Next in order was the report of the Budget Committee, by Chairman W. J. Jameson, of Montana. "The receipts for the fiscal year ending June 30, 1946", said Mr. Jameson, "reached an all-time high of $291,542, exclusive of Section dues. This was approximately $25,000 in excess of the receipts for the preceding year. The receipts for the current fiscal year up to September 30 were $42,000 in excess of the receipts on the same date in 1945.

"This very substantial increase in income has been due primarily to the intensive membership campaign of the past year, with most gratifying results from the standpoint of both membership and income. It has been due in part, also, to an increase in JOURNAL income (from advertising) of approximately $5,000 during the last fiscal year and $2,500 during the first three months of the current year.

"At the beginning of the fiscal year, your Budget Committee estimated income for the current year at $314,000, an increase of $24,000 over the actual income of the preceding year. It is now apparent from the receipts to date that this estimate was conservative and will be exceeded, although it is unlikely that the present rate of increase over the preceding year can be maintained. Expenses meanwhile have gone up rapidly with the costs of materials and operations.

"New activities undertaken by the Association, including the proposed survey of the legal profession, a resumption and expansion of activities by many Sections and committees following the war, and the necessity of additional expenditures for Headquarters because of its constantly increasing load, have resulted in a corresponding increase in requests for appropriations.

"The budget for the current year as approved by the Board of Governors appropriated a total of $340,548, or approximately $29,000 in excess of appropriations for the preceding year. While these appropriations exceed substantially the estimated income, it seems probable, based upon previous experience, that unexpended balances will offset the apparent deficit and that the Association will continue to operate within its income."

The report of the Special Committee on Ways and Means, presented by Chairman Philip J. Wickser, of New York, contained no recommendations and was received and filed.

Number of Assembly Delegates Is Increased

Chairman Howard L. Barkdull, of Ohio, gave the report and recommendations of the Committee on Rules and Calendar, relating to the filed amendments to the Constitution and By-laws of the Association (32 A.B.A.J. 588 and 712). The first was a constitutional amendment to increase the number of Assembly delegates from eight to fifteen, as follows:

Amend Article IV, Section 3, of the Constitution to read as follows:

Section 3. *Assembly Delegates.* At each annual meeting the Assembly shall elect five members of the Association as Assembly Delegates to the House of Delegates, no two of whom shall be residents of the same State. Election shall be by a plurality vote of the Assembly for a term which shall commence at the adjournment of the annual meeting at which such delegates are elected, and shall expire at the adjournment of the third annual meeting following their election. If an Assembly Delegate shall fail to register in attendance by twelve o'clock noon on the opening day of an annual meeting, the office of such delegate shall be deemed to be vacant; and thereupon the Assembly shall elect a successor to serve for the remainder of the term.

This amendment was approved by the House.

Regional Meetings of the Association

The second amendment, whereby the Constitution will contain a definitive plan whereby the Board of Governors is authorized to arrange and supervise Regional Meetings on a defined basis, was as follows:

Amend the Constitution by inserting as Article V a new article to read as follows:

Article V. Regional Meetings

Section 1. Regional Meetings of the Association may be held each year at such times and places, and serving such areas, as the Board of Governors shall designate. All arrangements for these meetings shall be under the supervision and control of the Board of Governors.

Section 2. Notice of regional meetings shall be announced at least thirty (30) days prior to the date set through publication in the American Bar Association Journal. Such additional notice as may be determined by the Board of Governors shall be given by the Secretary to the members of the Association in the regions where the meetings are to be held.

Section 3. The President of the Association shall be the presiding officer of each regional meeting and is authorized to appoint such committees as may be required for the conduct of the business of the regional meeting.

Section 4. Each regional meeting may take such action as it deems appropriate within the stated purposes of the Association and such action shall have effect as the expression of the members of the Association present at such meeting, and as a recommendation to the House of Delegates and the Assembly. The action taken shall be reported to the next meeting of the House of Delegates and Assembly in the form of appropriate resolutions and shall not be binding upon the Association until it shall have been approved by the House of Delegates.

Amend Articles V, VI, VII, VIII, IX, X, XI, XII and XIII, by changing the numbers thereof to numbers VI, VII, VIII, IX, X, XI, XII, XIII and XIV, respectively.

Plan Is Outlined and Debated

"It is believed that these meetings", said Chairman Barkdull, "present one of the most effective means for the expansion and development of the Association, by taking it into the field where personal contact and attendance may be had by the great body of member-lawyers, of whom most are unable to attend the Annual Meeting.

"Interest in Association affairs would be stimulated, and it is thought that an increase in membership will be brought about."

Sylvester C. Smith, Jr., of New Jersey, objected to the form of the amendment. "I am a little disturbed by the form of the amendment, because it requires a report of a recommendation voted by a Regional Meeting, which itself is an Assembly, not to the House of Delegates, which is the policy-making body that acts upon these questions, but also to the Assembly. As the Assembly is in effect a recommending body and they have their own Resolutions and the opportunity for presenting them, it seems to me that the report of these recommendations from the Regional Meetings should go to the House alone, rather than to the Assembly also. I feel, therefore, that the report of a Resolution adopted by a Regional Meeting Assembly should go to the House of Delegates only."

Mr. Smith moved that the words "and the Assembly" in line 6, the words "and Assembly" in line 8, and the added words "and the Assembly" in line 11, be deleted from the proposed amendment. This was put to a vote and carried. As thus amended the amendment of the Constitution was adopted by the House.

Provision for a Delegate from Each Section

Chairman Barkdull next moved the adoption of the third filed amendment, to provide for the election from each Section of a Delegate to the House, for a two-year term.

"Our Constitution now provides," said Chairman Barkdull, "that each Section chairman is a member of the House. It is proposed that instead each Section shall be permitted to elect from its membership its Delegate to the House."

The text of the proposal was:

Amend the Constitution by inserting in existing Article V, as Section 7, a new Section to read as follows:

Section 7. *Selection of Section Delegates.* Each Section of the Association shall be entitled to one delegate in the House of Delegates. At the annual meeting in each even-numbered year, each Section shall elect from its membership a delegate to the House of Delegates. He shall serve for a term of two years beginning with the adjournment of the annual meeting at which he is elected and ending with the adjournment of the annual meeting of the Association in the next even-numbered year. In the event of the resignation, disqualification or death of a Section Delegate the Council of the Section which he represents shall select and certify his successor for the unexpired term.

Amend existing Article V by changing the numbers of Sections 7, 8, 9, 10 and 11 to numbers 8, 9, 10, 11 and 12, respectively.

Mr. Barkdull explained that as an incident to this amendment, the corresponding change was required in Article V of the Constitution, Section 3, lines 27 and 28, by striking the words "the Chairman, or in his absence, the Vice Chairman of each Section of the Association," and in lieu thereof substituting the words, "the Delegates representing the respective Sections of the Association."

The above amendments were duly adopted by the House.

Mandatory Meetings of the Board of Governors

The next proposed amendment, which was also adopted by the necessary majority, was as follows:

Amend existing Article VI, Section 2, of the Constitution by striking out the entire Section in present form and in lieu thereof inserting the following:

Section 2. *Meetings.* The Board of Governors shall meet immediately prior to each meeting of the House of Delegates and shall hold not less than two additional meetings in each Association year. In no event shall the interval between meetings of the Board be greater than four months. Special meetings may be held at the call of the President and shall be called by the Secretary upon the request of three or more members of the Board. At any meeting a majority of the Board shall constitute a quorum.

The fifth and last amendment as to the Constitution was to give status to the two newly created Sections, and was as follows:

Amend existing Article IX, Section 1, of the Constitution by inserting after line 20, the enumeration of two new Sections, as follows:

Section of Administrative Law

Section of Labor Relations Law

The amendment was likewise adopted.

Amended Requirements as to Assembly Resolutions

For the Committee on Rules and Calendar, Chairman Barkdull proceeded to the filed amendments of the By-laws. The first read as follows:

Amend Article V, Section 2, of the By-laws by striking out the entire Section in present form and in lieu thereof inserting the following:

Section 2. *Resolutions.* (1) Every resolution offered for consideration in the Assembly shall be in writing and in duplicate and shall be concise in form. The Resolutions Committee, unless it finds and reports its reasons for doing otherwise, shall require the proponent of any resolution to revise and condense it, if need be, so that as reported, including the preamble, it does not exceed three hundred words.

(2) At any time between annual meetings, any member of the Association may file with the Chairman of the Resolutions Committee any resolution of the character prescribed in Article IV, Section 2 of the Constitution, for the consideration of the Committee and a report by it to the Assembly. During an annual meeting, any member of the Association may offer such a resolution only from the floor and only at the first session of the Assembly. At such first session, the Chairman of the Resolutions Committee shall bring to the attention of the Assembly the nature of the resolutions theretofore filed with him.

(3) Unless a resolution presented in the Assembly is offered by a Section or Committee of the Association, or in connection with the consideration of a report by a Section or Committee, such resolution shall be referred by the Chair, on presentation and without debate, to the Resolutions Committee for hearing, consideration and report to the Assembly.

(4) If a resolution filed by a member of the Association with the Resolutions Committee, or offered from the floor of the Assembly, proposes or opposes legislation, the proposal shall be accompanied by ten copies of the bill or by ten copies of a summary of its provisions.

(5) If a question arises as to whether or not a resolution is within the scope of the objects and purposes of the Association, the Resolutions Committee shall report to the Assembly its opinion on that question, and also upon the advisability of adopting the resolution. The opinion of the Committee upon the question shall be and stand as the opinion of the

Chair, unless an appeal therefrom is taken by any member, in which event the decision of the Assembly shall be by a vote of the members present.

(6) Only resolutions which are reported favorably by the Resolutions Committee or are adopted by the Assembly need to be published in the proceedings of the meeting.

W. E. Stanley, of Kansas, proposed an amendment to the first paragraph, to insert the words "submission in duplicate" after the words "shall be in writing". Mr. Stanley said he offered this amendment at the suggestion of Secretary Stecher, as it would relieve the Headquarters staff of making the necessary extra copies. The amendment was adopted, and the change in the By-laws was put to a vote as amended and was adopted by the House.

Amendments as to Section Meetings, etc.

To try to make uniform the circumstances under which special meetings of the Sections are held and members of Sections obtained, Chairman Barkdull submitted the following, which was adopted by the House:

Amend Article XII, Section 1, of the By-laws by adding at the end thereof the following:

No Section shall hold a regular or special meeting otherwise than at the time and place of the annual meeting, unless authorized by the Board of Governors.

Amend Article XII, Section 3, of the By-laws by adding at the end thereof the following:

No Section By-laws shall provide for or permit any class of membership except among members of the American Bar Association.

The last amendment as to the By-laws, providing for the definite authorization and procedure for the meeting of Section Chairmen, read as follows:

Amend Article XII of the By-laws by adding thereto a new Section as follows:

Section 7. *Meeting of Section Chairmen.* A meeting of Section Chairmen shall be held not later than sixty days after each annual meeting of the Association, at the time and place prescribed by the Board of Governors. If the Board of Governors shall fail to call the meeting of Section Chairmen and to specify the time and place thereof, the Secretary shall take such action. The Secretary of each Section shall be eligible to participate in such meeting.

Amendments of the House's Rules of Procedure

In order to make effective the provisions of the amendment to Article V, the Rules of Procedure of the House of Delegates were amended, where necessary, to give to Chairmen of Sections the same privileges and standing in the House as is now accorded to the Chairmen of Standing and Special Committees.

The second of the amendments to the House Rules, which was duly adopted by the House, was as follows:

(B) Amend Rule X by striking out all of Paragraph 1(d) and in lieu thereof inserting the following:

(d) The Committee on Hearings, which shall consist of seven members shall have the duty, upon reference by the House or the Chairman thereof, of holding hearings upon any matter on which non-members of the House ask an opportunity to present their views. The Committee shall designate promptly the time and place (which may be at any time during the year) at which the Committee will hold a requested hearing and shall give notice reasonably in advance thereof to the person, or persons, requesting that hearing. The Committee, upon its own initiative, may invite any person to attend any hearing conducted by the Committee. The Committee shall file promptly its report and recommendations on any hearing with the Chairman of the House. If the House is in session, or is about to meet, when such report is made, the report shall be calendared for prompt consideration by the House. If the House is not in session, or about to meet, when the Committee's report is filed, the Chairman of the House, in his discretion, may cause copies of such report to be distributed to the members of the House for consideration at its next meeting.

An amendment that the present Sections 13 to 20, inclusive, be renumbered, 14 to 21, inclusive, was then proposed by Mr. Barkdull and adopted by the House.

Amendment as to Association Dues

An amendment submitted by Walter M. Bastian, Ronald J. Foulis, Tappan Gregory, W. J. Jameson, Carl McFarland, James R. Morford, and Willis Smith, was then submitted by Mr. Barkdull for action, as follows:

Amend Article II, Section 1, of the By-laws by striking out the entire Section and substituting therefor the following:

ARTICLE II

Section 1. Scale of Dues. Each member shall pay Association dues for each year from July first to June thirtieth following, payable on July first of each year in advance, in such amount as may be from time to time determined by the House of Delegates upon the recommendation of the Board of Governors, which amount shall include the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, which is $1.50 per year; except that during the first five years after his original admission to the Bar, the Association dues of a member shall be in an amount not in excess of one-half of the amount determined for regular members as above provided.

(a) Amend the first sentence of Article I, Section 3 of the By-laws by striking from lines 4 and 5 thereof the words "the sum of $150 for such life membership," and substituting therefor the words, "such sum for life membership as may be fixed from time to time by the House of Delegates upon the recommendation of the Board of Governors," so that said sentence of Article I, Section 3 will read as follows:

Section 3. Life Membership. Any member of the Association who shall have paid regular dues for a period of ten years, may become a life member of the Association upon written notice to the Treasurer and payment of such sum for life membership as may be fixed from time to time by the House of Delegates upon the recommendation of the Board of Governors.

The amendment was adopted by vote of the House. Soon afterwards, Sylvester C. Smith, Jr., of New Jersey, moved "for reconsideration of the amendment in order to call for reconsideration of the vital issue in the report of the Publications Committee with regard to the weekly magazine." The motion to reconsider was carried, and the amendment thereby open for further consideration.

Upon the motion of William L. Ransom, of New York, the action to be taken on the question was postponed to a fixed time immediately following the consideration of the report of the Committee on Publications.

The first session of the House was adjourned at 5:10 o'clock on Monday afternoon.

■ The Wednesday afternoon session was the busiest, because of the heavy calendar. The Committee on Hearings reported its findings and recommendations from its hearings as to complaints concerning Opinion 255 of the Committee on Professional Ethics and Grievances. These were adopted. An amendment of the By-Laws to enable an increase in Association dues was approved. A report representing progress as to organizing to make legal service available to persons of moderate means was adopted. Unanimous recommendations from what is now the Committee for Peace and Law Through United Nations were adopted unanimously by the House. Majority and minority reports from the newly created Committee on the Judiciary evoked lively debate, with the House finally deciding to reserve the matters for further consideration. So the Committee was continued with the same powers as were voted to it last July, and the subject-matter of both reports was referred back to it for further consideration and report. On a considerable number of other matters, important actions were voted by this hard-working session.

Second Session

■ The second session convened at 2:15 o'clock on Wednesday afternoon.

Chairman Gregory recognized Chairman John M. Slaton of the Committee on Hearings, who referred to the report made by the Committee to the House of Delegates on July 1 (32 A.B.A.J. 462), and the action of the House of Delegates in approving the recommendations of the Committee, in connection with the complaints of Henry C. Friend, of Milwaukee, Wisconsin, and Marc J. Grossman, of Cleveland, Ohio, relative to the Amended Advisory Opinion No. 255 of the Committee on Professional Ethics and Grievances. (32 A.B.A.J. 201).

After giving appropriate notice to those interested, the Committee on October 26 and 27 held a hearing and received all of the evidence offered by each party who claimed to have been affected by Advisory Opinion No. 255 of the Committee on Professional Ethics and Grievances and by Rule and Standard 3(a) Interpretation 2 (12) of the Special Committee on Law Lists, and also heard the argument of the complainants and their counsel.

"Your Committee," declared Chairman Slaton, "doubts the propriety of any attempt by it to substitute its judgment for that of the Ethics Committee even though your Committee should think some amendment needed. The Ethics Committee, since the publication of Opinion 255, has promulgated some changes in its rules of procedure relating to hearings which if followed might possibly have avoided the present controversy."

The report continued:

Opinion 255 was announced in answer to a hypothetical question which did not contain all the facts claimed to be material by those who have appeared before our Committee. The abstract reasoning of the Opinion may need some qualification when applied to a concrete case. Without undertaking to decide definitely that such qualification should be made, we express our doubts, although we approve the Opinion in principle. We agree that it is unethical for a lawyer who lists himself or his firm in his own list, or in any list in which he has any financial interest, through such a list to recommend to laymen and others the use of his own services on the basis of the extent to which he has been investigated, such investigation having been made by himself.

Whether or not any impropriety would be removed if the list policy provided for equality of multiple listing, or if the extent of the ownership or interest was fully disclosed by the publication itself, and whether there may be a distinction between lists previously established and those that might be started subsequent to Opinion 255, are matters not wholly clear in the Opinion in its present form.

We also suggest that the Committee reconsider the effect of its own amendment adopted (June 9, 1944) of its original opinion.

The regulation of law lists is a matter of slow development and the further delay in this question is not important if a sound solution is ultimately reached.

We recommend that Opinion 255 be recommitted to the Committee on Professional Ethics and Grievances for further study together with the transcript of the evidence and the exhibits offered at the hearing before the Hearings Committee. It is my understanding that those who are interested have acquiesced in the wisdom of this opinion.

Governor Slaton's motion to adopt the report and recommendation was carried.

Action to Increase Association Dues

Next taken up was the amendment held over from the first session, relating to Article II, Section 1, of the By-laws. In view of the opinion received from postal authorities, the amendment was then offered to and adopted by the House in the following form:

Section 1. *Scale of Dues.* Each member shall pay Association dues for each year from July first to June thirtieth following, payable on July first of each year in advance, in such amount as may be from time to time determined by the House of Delegates upon the recommendation of the Board of Governors, which amount shall include the individual subscription of the member to the American Bar Association Journal, which is $1.50

per year; and as to other publications, of the Association, such sums as may be determined by the Board of Governors or the House of Delegates; except that during the first five years after his original admission to the Bar, the Association dues of a member shall be in an amount not in excess of one-half of the amount determined for regular members as above provided.

The amount of dues and life membership fee in effect on October 31, 1946, shall continue until changed by the House of Delegates.

Notable Report by Judge Niles' Committee

Secretary Stecher presented a Supplemental Report from the Board of Governors relating to Legal Service Policies. The coordinating committee created by the Board had consisted of representatives from the Committees on War Work, Legal Aid Work, Professional Services, and Low-Cost Legal Service Bureaus. Judge Emory Niles, of Maryland, in reporting as chairman, made the following recommendations:

"With respect to war work, we feel that the War Work Committees should now be discharged. They have carried on their work over years of stress, and they have done a magnificent job. We think they should not be asked to go ahead on a patriotic basis now that the war is over.

"With regard to low-cost service and referral bureaus or organizations, the Association has heretofore given its approval to the idea. It is our feeling that there is a wide field for that sort of work by the Association; and we recommend that the Association be active, enlarge the Committee if necessary, but generally to push the organization and operation of low-cost referral bureaus and similar organizations in localities where they do not now exist."

John Kirkland Clark, of New York, gave an interim report of progress by the Committee on Low-Cost Legal Service, noting the recent developments in New York City, where "after years of effort . . . the Association of the Bar of the City of New York, and the New York County Lawyers Association, combined in setting up the machinery for a low-cost legal service referral bureau . . ."

The report of Judge Niles' Committee on Legal Service Policies was adopted by the House.

Substantial Gains in Membership

A net increase of approximately 5,000 in the Association's membership, between the 1945 and 1946 meetings, was reported by Robert R. Milam, of Florida, Chairman of the Membership Committee. "The membership increased more since June 30 than it did from last December up to June 30," said Mr. Milam. "Some 2600 members have been admitted during the past three months and a half, through October 25." He attributed the large increase in membership to the excellent work done by the Junior Bar Conference and the Association's Membership Committee, as well as the efforts of the members of the House. Mr. Milam's report of the work under his leadership and the notable results were acclaimed by the House.

Cooperation in an International Bar Association

Reporting on the meeting called to consider the organization of an International Bar Association and filing a letter from the Committee set up by that group, President Willis Smith recommended that the Association participate in the formation of such an organization. Edgar Turlington, of the District of Columbia, Chairman of the Section of International and Comparative Law, read its recommendations, which were adopted by the House:

> RESOLVED, That the President of the American Bar Association is hereby authorized and directed to accept for this Association membership in the International Bar Association, provided that this Association shall be at liberty to resign from such membership, without incurring any obligation as a member upon notifying the Secretary General of the International Bar Association at any time within ninety days after the adjournment of the meeting which is to be held in New York City on February 17, 1947, for the adoption of the proposed Constitution of the International Bar Association;
>
> Second, That the President of the American Bar Association is hereby authorized to appoint the required representatives of this Association at the meeting to be held in New York City on February 17, 1947.

The report of the Committee on Professional Ethics and Grievances, which contained no recommendations for action, was received and filed.

Securities Law and Regulations

Chairman William A. Schnader, of Pennsylvania, submitted for the Committee on Securities Law and Regulations two recommendations, which were adopted by the House:

> RESOLVED, That the American Bar Association is opposed to the amendment to the Securities Exchange Act recommended to Congress by the Securities and Exchange Commission in its report of June 19, 1946, entitled "A Proposal to Safeguard Investors in Unregistered Securities"; and
>
> FURTHER RESOLVED, That if and when an Act is introduced in Congress embodying the recommendation made by the Securities and Exchange Commission on June 19, 1946, the Committee on Securities Laws and Regulations of this Association is authorized to communicate to the appropriate committees of Congress the foregoing Resolution.

A proposed Uniform Act Relating to Reverter of Realty and a proposed Uniform Criminal Statistics Act, copies of which were before the House, were approved after some debate. They were submitted by John C. Pryor, of Iowa, President of the National Conference of Commissioners on Uniform State Laws.

Report as to Legal Aid Work

Commenting on the report of the Committee on Legal Aid Work, Chairman Harrison Tweed, of New York, said: "The Committee has been hard at work since last February. We have worked through the State and local Bar Associations, and we have worked through the instrumentality of a field worker on a salary. We are working in ten cities, in New York, New Jersey, Massachusetts, Delaware, and Geor-

gia. We can report that in three of those cities—they are all cities of over a hundred thousand population or about that—legal aid has been established on an organized basis within the last six months.

"In two upstate New York cities —Syracuse and Binghamton—the chances are favorable for the setting up of a Legal Aid Office within a few months. The other five cities where we are working are Utica, New York; Patterson, New Jersey; Elizabeth, New Jersey; Worcester and Fall River, Massachusetts.

"The plan for the future is to extend and continue in other States substantially the work we have been doing. In Illinois, Indiana and Ohio, there is another group of ten cities of over one hundred thousand population, without any legal aid work. We intend to proceed to organize some work.

"We are conscious of the responsibility and of the amount of work that remains to be done, but we have high hopes of carrying on to bigger and better things, and to a part in what seems to me to be an essential to any public relations work of this Association."

The Report of the Committee on Law Lists was received and filed.

The House adopted the following Resolution, submitted by the Committee on Aeronautical Law:

> RESOLVED, That the American Bar Association endorses and approves the objective of the Provisional International Civil Aviation Organization (PICAO) to facilitate international air transport through the unification and simplification of laws and regulations relating to immigration, quarantine, customs and clearance; and that its Standing Committee on Aeronautical Law is instructed to continue its work, authorized by the Association in 1939, on these important matters.

Unanimous Support for The United Nations

A unanimous report of the Committee to Report as to Proposals for the Organization of the Nations for Peace and Law was presented by Chairman William L. Ransom, of New York, who said, in part:

"This report is joined in by all of the members of your Committee, who come from all parts of the country. Our purpose at this time is to present only such matters as will enable a united action rather than divisive action at this critical juncture.

"This Association and this House have, during the past three years, been a considerable factor in uniting and mobilizing the opinion of the profession and the public in behalf of a truly American policy for peace and justice through law.

"While your Committee has continued its studies and its work in many fields, and will doubtless present at some future time recommendations which may be controversial and go into further advanced ground, our emphasis at this time should be upon a unity of declaration by this House.

"Your Committee is moved to that point of view because of the present situation as I appraise it and report it to you from my observation of what is taking place on the Flushing Meadows and at Lake Success: We have been through a period of doubt and difficulty and, at times, discouragement with respect to the work for peace and law in this troubled world. My own judgment, which I could support with many instances if time were available, is that there is evident a beginning of progress toward a cooperation which unfortunately has too little existed since the war among the Nations which were united in the war."

Excerpts from the report were published in 32 A.B.A.J. 871. Chairman Ransom moved the adoption of Resolution No. 1, which was adopted unanimously by the House:

> RESOLVED, That the American Bar Association is of the opinion that in the present crisis as to the future of peace, freedom and law through organized international cooperation, no more solemn duty or more urgent obligation rests upon all Americans than that of giving active, united and wholehearted support to The United Nations and its agencies and to support without division the efforts of all those who are endeavoring to accomplish through The United Nations the great objectives of its Charter and the Statute of the Court.

Cooperating to Develop International Law

After a change suggested by Chairman Ransom with the approval of this Committee, its second Resolution, also unanimously adopted, (32 A.B.A.J. 854), read as follows:

> RESOLVED, That the American Bar Association joins with the Canadian Bar Association in declaring its desire and readiness to be of whatever assistance it can to the agency empowered by the General Assembly of The United Nations for the purpose of dealing with the progressive development and the statement or codification of international law; that the Association authorizes and instructs its Special Committee on Proposals for International Organization to cooperate with the Committee of the Canadian Bar Association and with other organizations, in behalf of the statement and strengthening of international law as rules to control and govern the conduct of Nations and their relationships; "that the Section of International and Comparative Law shall take part and assist in the carrying forward of the work so undertaken by the two Associations," and that the Association pledges to that end the utilization and active help of all of its Sections and Committees dealing with the various branches of the subject.

United Support for America's Foreign Policy

Committee Resolutions Nos. III and IV were also unanimously adopted by the House, respectively as follows:

> RESOLVED, That the American Bar Association is of the opinion that the people of the United States, irrespective of party, should unitedly and steadfastly support the foreign policy of our country as it has been declared by The President and the Secretary of State, and by Senators Connally and Vandenberg, in behalf of peace, justice, the rule of law, fair dealing, good will and mutual understanding, and organized cooperation for those ends, among all Nations and for all their peoples.
>
> RESOLVED, That the officers of the Association and its Committee are empowered to transmit any of the foregoing Resolutions to the appropriate officers of the Government of The United States, to members of the Congress, and through the authorized channels to the appropriate officials and agencies of The United Nations.

The report of the Special Committee on Custody and Management of

Alien Property, which contained no recommendations for action was received and filed.

The report of the Committee on Civil Service, by Chairman Murray Seasongood, of Ohio, contained a recommendation which was adopted by the House, as follows:

> RESOLVED, That the American Bar Association expresses its regret that in the current Independent Offices Appropriation Act for the fiscal year 1947 (Public Law 334, March 28, 1946) there appears the limitation in the appropriation for the United States Civil Service Commission that prohibits the Commission from using its funds to pay the expenses of the Board of Legal Examiners or its successor, the Legal Examining Unit, which was established in the Commission's Examining and Personnel Utilization Division.

Suits as to Unauthorized Practice of Law

Supplementing the Report of the Committee on Unauthorized Practice of the Law, David F. Maxwell, of Pennsylvania, Chairman, said: "There have been decided, or there is presently pending, four cases in this field. The first is a case brought by the Bar of Nebraska against a commerce practitioner, in which the Nebraska Bar was successful in obtaining an injunction enjoining him from practising law before the Intrastate Commission of that State.

"The next case of importance that has just been decided . . . was in the State of Kentucky, in a case brought by the Louisville Bar against the banks of Kentucky, in which the lower Court held in favor of the banks. An appeal was taken by the Bar to the Supreme Court of Kentucky. In its decree the Court said: 'On the contrary it (lower court's decision) should have sustained the prayer of the petition by permanently enjoining the defendants from engaging in or performing regularly and as a business, or advertising or soliciting and holding itself out to the public as qualified to so act, with or without compensation, directly or indirectly, in any of the following acts in the circumstances indicated; to wit, writing deeds, wills, conveyances, and other legal documents requiring expert knowledge and equipment in their phraseology, so as to comport with the law relating to such matters, or engage itself in preparing any instrument wherein it is designated as fiduciary to enforce and administer the provisions in same, or to hold itself out as possessing the requisite knowledge so to do'."

Mr. Maxwell, added that: "By far the most important litigation that is pending at the present time is the case brought by the Bar in the City of New York against a Certified Public Accountant. The case is important because it involves a direct issue as to whether a Certified Public Accountant may practise tax law. In that case, a Certified Public Accountant rendered an opinion to a manufacturing company for which he was not serving as a regular accountant, on a question involving the interpretation of the Sales Act of New York City.

"In the opinion of this Committee, this case may well serve to determine whether or not there is to be recognized in this country a group of experts who are not subject to Court discipline and not licensed as lawyers but who are to be permitted to practise law in specialized fields.

"It has long been the opinion of this Committee that something should be done by this Association to restrict the practices before administrative tribunals in the public interest."

The report of the Committee on Jurisprudence and Law Reform, of which Thomas B. Gay, of Virginia, is Chairman, contained no recommendations for present action, and was received and filed.

Committee on Admiralty Law Reports

Chairman B. Allston Moore, of South Carolina, of the Standing Committee on Admiralty and Maritime Law, presented three recommendations: With respect to the first recommendation given below, the Board of Governors reported that a brief *amicus curiae* had been filed by the Committee in an Admiralty case in the United States Supreme Court, and the filing of it had been authorized by the President and Board of Governors. This had been done because of the fact that the case might have come up for argument in the Supreme Court before action could be taken by the House. The Committee's recommendation read as follows:

> Your Committee recommends that it be authorized and directed to appear and represent as counsel the American Bar Association as *amicus curiae* in the Supreme Court of the United States in the case of *Hickman* v. *Taylor* (pending on certiorari to C.C.A. 3, 153 F (2d), 212), and to prepare a brief, in collaboration with counsel for the Maritime Law Association and other *amici curiae*, in support of the decision of the Circuit Court of Appeals for the Third Circuit, and to take appropriate steps to obtain permission to file, and to file, such brief on behalf of the American Bar Association in the Supreme Court of the United States.

The scope and contents of this brief had been criticized (32 A.B.A. J. 882). In view of the fact that the brief had already been filed under authority no action thereon was taken by the House.

Rules of Practice in Admiralty Cases

The following recommendations of the Committee were adopted by the House:

> After further consideration, your Committee withdraws the recommendation numbered "1" in its report for the year 1945 (70 A.B.A. Reports—1945; page 214). Your Committee recommends disapproval of the pending "Bill Extending the Powers of the Supreme Court of the United States in Prescribing Rules of Practice in Admiralty."
>
> Your Committee recommends that certain amendments to the Rules in Admiralty promulgated pursuant to statute for all federal Courts by the Supreme Court of the United States regarding "Limitation of Liability" and how claimed, be approved in principle as stated in detailed suggested rules hereinafter set forth.
>
> Your Committee further recommends that it be authorized and directed to take steps looking toward the adoption of same, and to oppose a proposed amendment, of which the Committee disapproved, to Rule 51, reading as follows:
>
> Limitation proceedings shall be

deemed commenced upon the filing of the petition provided the other requirements of this rule have been complied with within a reasonable time thereafter.

An amendment as above quoted would be contrary to the statute (46 U. S. Code, Section 185) which limits the Supreme Court's powers in promulgating Rules.

Your Committee further recommends disapproval of a proposed amendment that the words "value of the vessel", in present Admiralty Rule 51 be changed to read: "value of petitioner's interest in the vessel."

The report of the Committee on Judicial Selection and Tenure, which contained no recommendations for present action, was received and filed.

Committee on War Work Is Terminated

Acting upon the already adopted recommendation of the Committee on Legal Service Policies, which advised the early discharge of the War Work Committee, which had rendered such effective service, the Committee on War Work offered the following, which was adopted by the House:

WHEREAS, the War Work Committee, as instructed by the House considered the matter of "cooperation by this Association in legal assistance to the permanent peace-time armed forces" and, as its report, approves and concurs in the legal assistance recommendation of the Legal Service Policies Committee and

WHEREAS, the War Emergency, to meet which the War Work Committee was appointed, no longer exists, and its work is substantially completed,

NOW, THEREFORE, BE IT RESOLVED, that the War Work Committee be discharged.

Report as to the Court of Claims

In making a report for the Committee on the Court of Claims, Chairman Robert T. McCracken, of Pennsylvania, said: "In December, in Cincinnati, the Committee was empowered to undertake two tests (32 A.B.A.J. 240).

"The first was to draft and submit to the Congress legislation extending the jurisdiction of the District Courts so as to render that jurisdiction concurrent with that of the Court of Claims in all suits against the government, without the then existing and presently existing $10,000 limitation.

"The second was to make a study of the Federal Rules of Civil Procedure and of the rules of the Court of Claims, with a view to determining whether the Rules of Civil Procedure could be adapted to the practice before the Court.

"The first of these tests has been in part accomplished, in that the legislation has been finally drafted and agreed upon first by the Patent Section and, second, among all members of the Committee itself.

"It was not crystallized in time to have it presented to the present Congress, but it is now ready for presentation to the Congress which will assemble in January and will so be presented.

"The second test is in the course of study."

Next in the order of business was the report of the Committee on State Legislation, by Chairman William W. Evans, of New Jersey. As a large amount of time had been needed for the appointment of Committee members and the convening of State Legislatures last January, which was only a month after the present Committee took over, Mr. Evans stated his intention to offer an amendment to provide for a longer term of service for officers and members of this Committee.

An interim report by the Committee for Retirement Benefits for Lawyers was received and filed. The Committee's work will not be completed until the mid-year meeting.

Reports by the New Committee on the Judiciary

Next in order was the report of the Committee on the Judiciary, created at the mid-year meeting of the House of Delegates in July (32 A.B.A.J. 401). Chairman John G. Buchanan, of Pennsylvania, gave the majority report (quoted from in 32 A.B.A.J. 824), with the concurrence of Joseph N. Welch, of Massachusetts; Douglas McKay, of South Carolina; Francis H. Inge, of Alabama; J. P. Taggart, of Ohio; Richard Bentley, of Chicago, and Roy E. Willy, of South Dakota. Jackson A. Dykman, of New York, who was not present at the Committee's meeting, later concurred in the majority report. A minority report was filed by A. W. Trice, of Oklahoma, and Loyd Wright, of California. Mr. Buchanan referred first to the resolution offered by Mr. Wright at the meeting of the House in July (32 A.B.A.J. 401).

"All but one of the members present at our meeting," said he, "—and I find I may say the same thing of two members who were not present—believed that any limitation of appointments to the Supreme Court, in whole or in part, to judges serving in other courts, would be most unfortunate." (32 A.B.A.J. 824).

"As to the second part of Mr. Wright's resolution," said Mr. Buchanan, "with regard to the assignment of justices to other functions than those consistent with their judicial office, the Committee, while opposing the memorializing of Congress on the subject, nevertheless wishes to study the question further." (32 A.B.A.J. 824).

"The Committee wishes to have further time to consider whether the advantages gained from the services of Justices in such capacities as those to which these members of the bench were assigned, outweigh the disadvantage to the administration of justice in depriving the Court of the presence of a full bench for long periods of time."

Mr. Trice's Proposal to Amend the Constitution

The resolution offered by Mr. Trice, of Oklahoma, at the July meeting (32 A.B.A.J. 401) proposed the submission of an amendment to the Constitution rather than a memorial to the Congress. The attitude of the Committee on the several components of the proposed amendment was stated in 32 A.B.A.J. 824.

Resolution and Debate as to the Committee

Chairman Buchanan reported that his Committee considered the substitute resolution prepared by the Committee on Draft (32 A.B.A.J. 401, 421), and by a vote of six to one re-

jected it. "Having rejected all of the resolutions referred to it, the Committee members present, after consideration, adopted unanimously our present recommendation. This differs from Judge Ransom's resolution adopted by the House (32 A.B.A.J. 401), under which the Committee is now acting, in only two respects: One is that a member of the Committee be appointed not only from each judicial circuit but also from the District of Columbia, where so many problems with regard to the federal judiciary arise in connection with Courts that have no connection with any judicial circuit. The other change is perhaps a variance only in form. The Resolution under which the Committee is acting says: 'The Committee shall not have the power itself to select and propose particular nominations for any judicial office.'

"The Committee does not ask for authority itself to select and propose particular nominations for judicial office, but the Committee firmly is of the opinion that the only effective method of opposing a proposed nominee who is believed to be not qualified for the judicial office or not so well qualified as another available person, is to support the qualified nominee; and the Committee asks for itself the power to report to the House of Delegates or the Board of Governors, as the case may be, its recommendation that the House or the Board shall propose or oppose nominations for judicial office."

Mr. Buchanan then read the Committee's Resolution and moved its adoption, on behalf of the majority:

> RESOLVED, That a Committee on the Judiciary be established, to consist of a member from each of the ten federal judicial circuits and a member from the District of Columbia, with the following powers:
>
> The Committee shall have the power to consider and report concerning all matters relating to appointments of judges of Courts of the United States, and to recommend to the House of Delegates or Board of Governors such action as it may deem to be advisable to promote the appointment and confirmation of competent judges and to oppose the nomination or confirmation of unfit candidates.
>
> The Committee shall have power, also, to consider and report on questions as to whether the behavior of judges of the Courts of the United States has been good within the meaning of the Constitution of the United States, and to recommend to the House of Delegates or the Board of Governors such action as it may deem to be advisable with regard thereto.
>
> The Committee shall have the power to consider and report concerning such other matters related to the foregoing as may be referred to it by the House of Delegates or the Board of Governors.

Minority Report Is Offered

A. W. Trice, of Oklahoma, was recognized by the Chair to present the minority view in the Committee, for Loyd Wright and himself. "The resolutions which were submitted to this Committee, taken together," said Mr. Trice, "proposed action by the Association toward the following objectives:

1. The establishment by law of qualifications for appointment to the Supreme Court.
2. The limitation by law of assignments of judges of the Courts of the United States to non-judicial duties.
3. The creation of a practicable procedure for the removal of judges who may prove to be unfit.

"We are convinced that the objectives are desirable and that action to attain them is imperative. We believe that a duty to act rests on this Association as the only effective representative of the national Bar.

"The report of the Committee is to the effect that these objectives are not to be desired, or that immediate action to attain them is either unnecessary or unwise. With this we cannot agree.

"The report of the Committee proposes that the Committee be continued and given the power to propose to the House of Delegates or the Board of Governors the appointment of particular persons to the federal bench. That power was specifically denied the Committee in the Resolution establishing it. We believe that restraint is wise and should not be relaxed if the Committee is continued.

"There is no hope, if we are realistic, that either the appointment or confirming power will listen to voluntary advice. Experience would indicate the soundness of this viewpoint. Hence, there must be established some qualification by law. We also believe that the subject is of such pressing importance as to compel immediate action. For these reasons, we cannot concur in the report of the Committee and must register our dissent."

Committee Recommendation Is Debated

W. Eugene Stanley, of Kansas, questioned the wording of the majority Resolution, and said: "That language may be construed by some as giving the authority to the Committee to actually recommend the names of judges for appointment." He called attention to the contrary provision of the Resolution adopted by the House of last July (32 A.B.A.J. 401), and added: "Those qualifying words and limitations upon the power of the Committee are very essential, in giving to a Committee the power to get into what might otherwise have considerable political repercussions.

"In this matter, the American Bar Association, through its Committee, can actually meet its obligations by throwing its weight against unqualified individuals who may be up for appointment; but it seems to me that the qualifying terms which were in Judge Ransom's Resolution should be added to the recommendation of the majority of the Committee."

Mr. Stanley moved that the Committee draft be amended by restoring at the end the words: "The Committee shall not have the power itself to select and propose particular nominations for any judicial office."

In answer to a question from the floor, Mr. Stanley said that the purpose of his amendment was that the Committee should have the right to oppose the nomination of an unqualified individual.

Resolution To Refer Both Reports Is Carried

Loyd Wright, of California, offered a substitute motion that neither report be accepted and that the mat-

ter be referred back to the Committee for further report at the mid-winter meeting.

In opposition to Mr. Stanley's amendment and Mr. Wright's motion, Chairman Buchanan declared that "it is the opinion of this Committee that it can do nothing by merely opposing an appointment which will not be for the best interests of the country. The Committee does not ask for power for itself to act, but it does ask that this Association will act, not merely to oppose bad men but to further the appointment of good men.

"You cannot oppose very successfully a man with powerful political backing, who has an unimpeachable family and church record and a modest practice in which he has been guilty of no misconduct, unless you can support, in his stead, the appointment of a real lawyer. And the Committee believes that real lawyers will be willing to signify their willingness to accept appointments to the federal bench if they can be assured of the backing of the organized Bar of the United States, federal, State and local.

"Without that support, real lawyers will stand little chance against the men who have supported a party ticket through thick and through thin, not without reward in appointment to minor offices but who think that they have reached the place in political service which entitles them to recognition as judges of the federal Courts."

George Maurice Morris, of the District of Columbia, said, in part: "If Mr. Wright's motion for a reference back to the Committee carries, it would seem to me that it would be advisable if we were to have from the Committee a plan of the mechanics of how this is going to work. Apparently, the plan of the Committee is to have a member in each of the ten federal judicial circuits and a member from the District of Columbia. Unless the House is in session or is about to be in session, it would seem that a recommendation from the Committee would have to go to the Board of Governors. I should like to be rather clear as to just how the Committee and the Board of Governors is, mechanically, to find out the qualifications of the men suggested for judicial appointment. For that matter, it would seem to me that Mr. Wright's motion for further consideration is worthwhile. I would like to be sure that when the eleven members of the Committee and the sixteen members of the Board of Governors have the authority, they will speak for the 40,000 members of the American Bar Association with an effectiveness that will really carry weight with the persons to whom they are speaking."

The substitute motion was put to a vote and was carried by a divided vote of the House. "The Committee is continued as it was, and this matter recommitted for reconsideration and further report," declared Chairman Gregory.

The second session of the House adjourned at 5:30 o'clock.

■ As the meeting moved toward its last day, a grist of business was expedited by the House, at times after lively debate. An amendment of Section 60(a) of the Bankruptcy Act was recommended. A National program of continuing education of the Bar was favored. Troublesome questions as to authors' rights under copyright law were reported on by the Section in charge, in connection with the proposed Inter-American Convention. In view of the conflict of views in the Section of Patent Law, the House referred the matter also to the Section of International Law for report. Several resolutions from the latter Section were adopted.

The publication of a bi-weekly or weekly news publication by the Association, when its feasibility in all respects has been decided, was voted. The Fyke Farmer resolution as to "world government", and a substitute resolution by State Delegate Winslow, of North Carolina, were referred to the Section of International Law for further study and report.

Third Session

■ When the House convened on Thursday afternoon, for its third session, Robert R. Milam, of Florida, took the floor to comment on the action taken on the report of the Committee of the Judiciary. He said that although a great deal of work had been done by members of the Committee, the House had merely referred the majority and minority reports back to them for further consideration. "They ought to be told whether or not they are working along the right lines and in keeping with the thought of the House," he said.

Mr. Milam moved that the House "approve in principle the work of the Judiciary Committee as set forth in their recommendations." The House adhered to its view that the whole subject be reserved for comprehensive report and further debate.

Sidney Teiser, of Oregon, presented a report as Chairman of the Section on Corporation, Banking, and Mercantile Law, which he said was now the largest of the Association's Sections. The following Resolutions from the Section were adopted by the House:

RESOLVED: That the American Bar Association recommends to the Congress of the United States that Section 60 (a) of the Bankruptcy Act be amended so that said Section read as follows:

THE AMENDMENT[1]

60a (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII, or

1. The portions in italic are the proposed changes in and additions to Section 60(a). The bracketed portions are eliminations from the Act as it now exists. The portions appearing in ordinary type are portions of the present Act not changed by the proposed amendment, and, of course, will remain the same.

XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) *Except as provided in paragraph (3), for* [For] the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that [no bonafide purchaser from the debtor and] *no creditor having the legal and equitable remedies available to a judgment creditor under applicable state law* could thereafter have acquired any [rights] *interest* in the property [so] transferred superior to the [rights] *interest* therein of the transferee [therein].

(3) *A transfer for or on account of a present consideration shall, to the extent of such present consideration, be deemed to have been made at the time of the transfer unless (a) the statutes of the state which are applicable to the transfer require the transfer to be perfected by recordation or otherwise, or (b) the law of the state which is applicable to the transfer requires the transfer to be perfected by a delivery of the property transferred, in order that in either of the cases specified in (a) or (b), no creditor having the legal and equitable remedies available to a judgment creditor under applicable state law could thereafter have acquired any interest in the property transferred superior to the interest of the transferee therein. In either of the cases specified in (a) or (b), the time of the transfer shall be determined by the following rules:*

If such statute or law specifies the time within which the transfer shall be perfected and it be so perfected within that time, or if such statute or law specifies no time and the transfer be perfected within ten days after the transfer, the transfer shall be deemed to have been made at the time of the transfer.

If the transfer be perfected after the time specified by such statute or law or after ten days from the date of the transfer if no time be so specified, the transfer shall be deemed to have been made at the time of such perfection.

The Committee on Judicial Salaries had no report at this session.

The report of the Special Committee on Administrative Law announced its termination because of the creation of the new Section. No report was filed at this meeting by the new Section of Administrative Law.

The Junior Bar Conference likewise filed no report at this session.

Resolutions as to Legal Education

In the absence of Chairman Joseph A. McClain, Jr., of Missouri, who had left Atlantic City, John Kirkland Clark, of New York, presented the following Resolutions for the Section on Legal Education and Admissions to the Bar, each of which was adopted:

Resolution I: To amend Article III, Section 2, of the Section's By-Laws to read:

There shall be a Council which consists of the Chairman, Vice-Chairman, the last retiring chairman, and Secretary, all of whom shall be members *ex officio*, together with eight members to be elected by the Section as hereinafter provided.

Resolution II: RESOLVED, That the American Bar Association undertake to initiate and foster a National program of continuing education of the Bar; and be it further

RESOLVED, That the development and coordination of this program be implemented by the Section of Legal Education and Admissions to the Bar acting through the Section's Committee on Continuing Education of the Bar.

Majority and Minority Views as to Copyrights

Robert C. Watson, of the District of Columbia, presented the first Resolution recommended by the Section of Patent, Trade-Mark and Copyright Law, as follows:

RESOLVED, That the Association disapproves ratification by the United States of the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, signed at the Inter-American Conference of Experts on Copyright, Pan-American Union, June 1-22, 1946.

In commenting on this Resolution, Mr. Watson said: "The Section found the proposed Convention to be defective in a number of respects. The vote in our Section was 94 to 3 in favor of the Resolution for disapproval. This vote was after full hearing of the Chairman of the Section's Committee on Copyrights. Back of his recommendation was the very careful study of a Committee of nine members, including the Registrar of Copyrights and a number of others well versed in the Copyright Law."

Mr. Watson stated further that the Section's Committee on Copyrights had split six to two, and that a minority report had been filed. The dissenting members said: "Although some of the new ideas in the Convention may prove unwise or unworkable, others may prove very desirable. Here is an opportunity to experiment with copyright reforms on a limited scale.

"The Committee should not be used as a safeguard for commercial interests. We must stop thinking in commercial terms, and think and act in esthetic and literary terms. It would be to the credit of our Government to follow in the wake of most of the civilized governments of the world, in the recognition of the complete rights of an author; and it would be an advance step in our legislation to approve and ratify the proceedings of the Convention."

Resolution Is Referred to Another Section for Report

Continuing, Mr. Watson said: "Our Section listened attentively and concluded that inasmuch as half the world's business is done in this country, and because of the immense interests in our publishing houses in the copyright law, the moving pictures, and all of those concerns which are working under our copyright laws at this time, we should not experiment in the manner suggested in the minority report of the Copyright Committee." Mr. Watson moved the adoption of the Section's Resolution.

George Maurice Morris, of the District of Columbia, moved that the Resolution be referred to the Section of International and Comparative Law for further study and that a report be submitted at the mid-year meeting. Mr. Morris said that it was unlikely that Congress would take action on the Convention before that time and that, in view of the treaty aspects of the whole matter, it should come within the scope of the Section of International and Comparative Law.

The motion was adopted, and the

Resolution of the Section was referred to the Section of International Law or its Council for consideration and report.

Further Resolutions from the Patent Section

The second and third Resolutions offered by the Section and adopted by the House were as follows:

RESOLVED, That the Association approves in principle H.R. 5940 (to make the subject matter of patents owned by the government freely and promptly available for use by and for the benefit of the citizens of the United States, its Territories, and possessions.)

RESOLVED, That the word "two" in line three of Section 1 of Article XI of the By-Laws of the Section of Patent, Trade-Mark and Copyright Law shall be changed to read "three". (Thus increasing Section dues from $2.00 to $3.00).

The Section's fourth Resolution, proposing that the Association undertake the publication of a weekly law bulletin which shall carry a regular weekly section dealing with matters relating to the patent, trademark and copyright law, was at first adopted by the House. However, on the motion of James L. Shepherd, Jr., of Texas, the action was reconsidered and the Resolution was deferred until after the report of the Committee on Publications. Then it was referred to the Board of Governors.

Resolution as to State-wide Judicial Conferences

Judge John J. Parker, of North Carolina, in reporting for the Committee on Improving the Administration of Justice, said: "I regard the work of this Committee as one of the most important matters before the Association today. I do not say *the* most important matter, because if I am frank with myself I think the most important matter before the American Bar is the assumption of world leadership which falls to the lot of America in this crucial hour. Unless democracy is made efficient, democracy will not survive, and there is no place where that efficiency is more important than in the administration of justice."

The recommendation of the Committee was transmitted to the House by the Board of Governors with the recommendation that the subject-matter of the Resolution be left to the incoming Board of Governors, in view of the constitutional amendment for Regional Meetings. A motion to that effect was carried. The Committee's recommendation was as follows:

That the American Bar Association, through the Special Committee on Improving the Administration of Justice, sponsor State-wide judicial conferences in twelve States during the ensuing Bar Association year; that such judicial conferences be held in cooperation with the State Supreme Court, the State Judicial Council (if any), the Attorney General, the officials of State and local Bar Associations, and the officials of any judicial, legislative or other organization interested in improving the administration of justice; that such State-wide judicial conferences invite all members of the Bench and Bar and interested laymen to participate; and that the principal program at said judicial conference be devoted to a complete explanation of the American Bar Association program sponsored by the Special Committee on Improving the Administration of Justice; and that States selected for this program be determined by the President of the American Bar Association, the Chairman of the House of Delegates and this committee.

A News Publication for the Association

Carl McFarland, of the District of Columbia, Chairman of a Committee which had been exploring the project of a news publication by the Association for its members, reported in favor of "a standard, professional-sized bulletin, with a page size of 6 x 8 inches, and a minimum of sixteen pages." For the Committee he offered and moved the following Resolution:

1. BE IT RESOLVED

(a) That a new publication of this Association shall be issued as soon as the Board of Governors may find it within the means of the Association, with or without advertising;

(b) That it shall be published fortnightly until such time as the Board of Governors shall find it practicable to have it published weekly;

(c) That it shall include, among other things, current reports of important legal developments, periodical and other legal literature, news respecting legal education, items respecting all sections and committees of the American Bar Association, and such other current information as may be of interest as news to the members of the Association;

(d) That it shall be distributed to members of the Association without charge, but the Board of Governors may allocate to the expense thereof such portion of individual membership dues as it may deem desirable;

(e) That, for the foregoing purposes, the President of the Association, with the consent of the Board of Governors, is authorized and directed to appoint such committees to make such plans or to perform such editorial or managerial functions as may be necessary;

(f) That the Board of Editors of the AMERICAN BAR ASSOCIATION JOURNAL shall cooperate and assist so far as may be possible in the undertaking; and

(g) That, until such publication is launched the Board of Governors shall report to the House of Delegates at its next mid-year meeting and to each meeting of the House of Delegates thereafter respecting its progress in carrying out this resolution.

2. BE IT RESOLVED, That the Board of Governors shall, with respect to the Board of Editors of the AMERICAN BAR ASSOCIATION JOURNAL and such committee or committees as may have been appointed to plan or carry out a news publication, provide the necessary supervision and determination of policies and recommend to the House of Delegates, at its next meeting, a plan for the complete integration of all Association publications.

3. BE IT RESOLVED, That, with respect to any existing or new publication of this Association other than the AMERICAN BAR ASSOCIATION JOURNAL, the Board of Governors shall, after receiving the recommendations of the committee it establishes for the purpose of issuing a current regular Association news publication, determine whether such other existing or new publication shall be continued or be permitted to begin as the case may be.

The Board of Governors reported the Resolution favorably, by a vote of nine to five. Mitchell Long, of Tennessee, a member of the minority in the Board of Governors, pointed out that the Resolution was mandatory that the Board "enter upon this publication scheme".

Former President Walter P. Armstrong, member of the Board of Editors of the JOURNAL, urged that "the plan is merely a leap in the dark" and that it would be better to see if a need for so costly an additional publication actually develops. W. G. McLaren, of Washington State, expressed similar views.

William W. Gibson, of Minnesota, expressed the view that the experience in his State Bar Association showed the usefulness of a news bulletin. Former President Henry Upson Sims, of Alabama, opposed the "tabloid form of Association news" and expressed the fear that such a prospect would "destroy the JOURNAL". Robert C. Watson, of the District of Columbia, favored the project, as voted by the Section of Patent Law.

W. E. Stanley, of Kansas, a member of the Committee, favored the development of such a publication "by evolutionary process". Former President David A. Simmons, of Texas, vigorously urged immediate action by the House and the starting of such a publication. State Delegate Frank W. Grinnell, of Massachusetts, opposed it. Former Governor Slaton, of Georgia, declared that "the JOURNAL is superb" and "to multiply these publications would put an extra burden on the lawyers".

William L. Ransom, Editor-in-Chief of the JOURNAL, discussed several angles of the proposals contained in the Resolution, in relation to their effects on the JOURNAL. He pointed out that with one exception every department and feature mentioned in the Resolution as to be taken over by the news bulletin, has been developed in the JOURNAL and that one will be in the next issue. "I doubt if such a taking out of live features is evolution", he said, "or that the JOURNAL can be a fighting, militant organ of the profession if you leave it a mere law review".

Walter W. Land, of New York, Chairman of the Section of Real Property, Probate and Trust Law, expressed the view that the Sections prefer themselves to print and distribute their current material to their own members, as provided for in the Section dues, instead of having the Association send it to all of its members, whether members of the Section or not. Robert R. Milam, of Florida, said that he "would far rather read one good publication than two mediocre ones", and questioned whether an expenditure of $50,000 to $100,000 for a second publication by the Association was necessary.

Chairman McFarland took the floor to close the debate. He modified his Resolution to read as follows:

(a) BE IT RESOLVED, That a news publication of this Association shall be issued as soon as the Board of Governors may find it feasible in every respect.

(b) That it shall be published fortnightly until such time as the Board shall find it practicable to have it published weekly and that it shall be distributed to the members of the Association without charge, but the Board may allocate to the expense thereof such portion of individual membership dues as it may deem desirable.

The above Resolution was put to a vote of the House. On a division, the count showed 56 for and 36 in the negative, with many members not voting. Acting under the authority of the Resolution, the Board of Governors on November 1 created a Special Committee to report as to feasibility and submit a plan for such a publication and its coordination with the JOURNAL and other publications of the Association. President Rix appointed William B. Jameson, of Montana; Walter P. Armstrong, of Tennessee; and Loyd Wright, of California.

Resolutions from Section of International Law Are Adopted

The House adopted the following Resolutions from the Section of International and Comparative Law: The Section recommended that the Resolution introduced by John T. Barker, of Missouri, on July 3, 1946, which was referred to the Section for consideration and report, be adopted in the following amended form:

WHEREAS, Suspicion and distrust among nations are engendered and fostered by general lack of knowledge of the principles and the administration of the different legal systems in effect and operation throughout the world, and

WHEREAS, Suspicion and distrust can be dispelled by mutual observation of the work of the Courts and the teaching of lawyers upon an international scale, and

WHEREAS, Judges and teachers of law are peculiarly competent to learn and to impart knowledge to the peoples of their own and other nations; be it

RESOLVED, In order to promote peace, good will, and better understanding among peoples of The United Nations, that the American Bar Association recommend to the General Assembly of The United Nations that The United Nations Economic, Social and Cultural Commission provide for an exchange of visits of judges and teachers of law among The United Nations and provide for participation of such teachers as may be so exchanged, in the work of training of lawyers.

The House adopted without debate further recommendations from the Section, as follows:

RESOLVED, That American embassies and legations in foreign capitals should be provided with competent legal advisers with a view to assisting in the settlement of international disputes in their initial stages by the application of legal principles and techniques in the course of co-ordinated national legislation and the growth of world law.

RESOLVED, That the basic principles of conservation of fisheries should be incorporated in bi-lateral or multipartite treaties so that the food requirements for fishery products of our own as well as of other nations may be met and international cooperation obtained in order to eliminate causes for international dispute.

RESOLVED, That the Axis nations should be required to restore to American owners, or make compensation for, all property belonging to such owners, sequestered, confiscated or otherwise taken or unlawfully destroyed by the Axis nations, either in their own territory, or in territory occupied by them, or elsewhere. In the event any such property has been sold or liquidated, the proceeds thereof should be turned over to the American owner and such owner should be reimbursed by the Axis nation involved for any difference between the proceeds and the fair value of the property at the time of the sale. American

owners who have parted with title to property under duress should be compensated in the same manner as if such property had been confiscated.

FURTHER RESOLVED, That priority of payment from all sums available to the United States from the Axis nations should be accorded to private claimants whose claims have legally been established as against any claims which the United States may assert, in its public right, against the Axis nations by way of reparations.

Judge Frederic M. Miller, of Iowa, presented the fourth recommendation of the Section concerning the Resolution offered by Fyke Farmer at the 1945 Annual Meeting, concerning world government. In doing so he said: "Mr. Farmer and I had an all-day session in Des Moines, as a result of which we redrafted the resolution. I thought at the time that I worked out this report that the House had already decided the really vital question in the resolution. (32 A.B.A.J. 469).

After narrating what had taken place in the Section Council and the Assembly, Judge Miller asked that a substitute motion be allowed so that if the substitute motion is defeated by the House there will be no need to convene the Assembly but if it prevails then it is action of the Association without the participation of the Assembly. Preliminary to the substitute motion, Judge Miller moved that the report of the Section be approved and that the matter be referred to the Section for further investigation and for report after such investigation.

State Delegate Francis E. Winslow, of North Carolina, was recognized to present the following substitute motion for the pending motion:

WHEREAS, The devastation and untold sorrow produced by two World Wars have demonstrated that peace cannot be maintained through preparations by individual nations for defense against war, and that enduring peace can be attained only through the establishment of justice administered according to law, on a basis that will eliminate resort to war for the settlement of international disputes; and

WHEREAS, The United Nations Organization is a momentous advance toward, and provides the machinery essential for a federation of nations with limited delegated powers, providing the minimum of centralized control in international affairs and the maximum of self-government in national affairs; and

WHEREAS, In order to preserve the unity between the nations of the world so far attained through The United Nations Organization, it is necessary to support the present Charter but at the same time, to keep unceasingly in view the objectives and development of The United Nations as an effective world government, to that end be it.

RESOLVED, That the American Bar Association affirms its belief in the following principles:

1. World peace must rest upon the solid foundation of justice administered according to law.

2. That the United States Government should take the lead in, and support, a movement to enlarge the powers of The United Nations to prevent war and to eliminate the causes of war by investing The United Nations with power to enforce, enact, and interpret laws, to prevent individuals and nations from waging wars, in such a manner as justly takes into account the principle of weighted representation without impinging on the sovereignty of any nation any more than absolutely necessary to preserve peace.

The House voted to refer the substitute motion, as well as the original Resolution to the Section for further study and for report at the next meeting.

President Smith made a brief statement as to what had taken place in the Assembly that morning, and asked the House to consider the parliamentary basis on which he had ruled on the point of order as to the number of members required to be present to constitute a quorum in the Assembly.

The third session of the House was adjourned at 5:20 o'clock.

■ In a concluding session of more than two hours, the House twice rejected motions to reconsider its reference of the proposed Inter-American Convention on author's rights in copyrights, to the Section of International Law, for report also by it, in addition to the report by the Section specially in charge of the subject. Many resolutions from the Section of Taxation, as to amendments of the Internal Revenue Code, were adopted; and the Section's considered plan as to appointments to the Tax Court was strongly approved (32 A.B.A.J. 825, 865). Acting on Resolutions adopted by the Assembly, the House, after debate, deferred until its mid-year meeting the Teasdale Resolution against the Connally amednment of the Morse Resolution (S. Res. 196) as to the World Court (32 A.B.A.J. 874). After striking out its "recital" clauses, the House adopted the Assembly Resolution disapproving the proposed amendment of Rule 30(b) of the Federal Rules of Civil Procedure, as to adversary access to a lawyers' files. Other Resolutions were adopted, and the House completed its calendar by unanimous elections of association officers for the ensuing year.

Fourth Session

■ The fourth and concluding session of the House at this Annual Meeting convened Friday morning at 10:15 o'clock, with much to be done before adjournment could be taken.

Charles E. Stephens, of Illinois, reporting as Chairman of the Section of Bar Activities, stressed the advantages to be obtained by the State and local Bar Associations from the Conference of Bar Association Secretaries, held at the time of the Annual Meeting.

The report of the Section of Criminal Law was presented by John R. Snively, of Illinois, a member of the Section Council. It dealt with the problems of juvenile delinquency and the efforts to codify the federal laws as to crimes.

Sylvester C. Smith, Jr., of New Jersey, for the new Section of Labor Relations Law, told of its organization. "We feel that the Section has made a good beginning," he said, "and that we are going to render a distinct service in an important branch of the law."

A debated issue recurred when Robert C. Watson, of the District of Columbia and the Section of Patent Law, moved to rescind and reconsider the vote the previous day to recommit to the Section of International Law for consideration and report the resolution from the Section of Patent Law disapproving the proposed Inter-American Convention on the rights of the author in literary, scientific, and artistic works.

George Maurice Morris, of the District of Columbia, opposed the motion and urged strongly that the whole matter should be reviewed by the Section of International Law or its Council, before the House voted on the Convention. Mr. Watson's motion to rescind was rejected by the vote of the House.

Mr. Watson then renewed his offer of his Section's fourth resolution, the consideration of which had been deferred until after action had been taken on the report of the Committee on Publications. His resolution was referred to the Board of Governors and read as follows:

> RESOLVED, That the Association undertake the publication of a weekly law bulletin which shall carry a regular weekly section dealing with matters relating to the patent, trade-mark, and copyright law; that the bulletin be made available to all members of the American Bar Association as an incident of membership, even if an increase in dues is necessary to accomplish this end; and that the American Bar Association employ a qualified writer to edit or prepare material for publication in the bulletin dealing with activities and matters of interest to the Section and to the general Bar, dealing with the subjects of patent, trade-mark and copyright law.

Report by the Section of Taxation

In presenting the report of the Section of Taxation, Chairman Percy W. Phillips, of the District of Columbia, advised the House of the results of the hearings held by the Joint Committee of the Congress on Internal Revenue, in respect to the Excess Profits Tax Law. The Section had taken an active part in the consideration of the subject. An excess Profits Tax Council has been organized by the Treasury to improve the administration of this law.

For the House Committee on Section Reports, James L. Shepherd, Jr., of Texas, reported favorably Resolutions 1, 2, 3, 4, 5, 6, 7, 11 and 12 from the Section of Taxation, all of which dealt with amendments of the Internal Revenue Code. Each was adopted, by vote of the House. These Resolutions were summarized in detail in "Tax Notes" in our December, 1946, issue (page 892), and will be printed in full in the Association's Annual Report Volume.

Action as to Appointments to the Tax Court

Chairman Phillips offered Resolution No. 8 of the Section of Taxation. It proved to be one of the most significant matters considered at the 1946 meeting (32 A.B.A.J. 825). "The Tax Court is an administrative agency in the Executive branch of the Government, according to the statute," he said. "Its functions, however, are those of a Court which is adjudicating tax cases. Its members are nominated by the President and are confirmed by the Senate, for a term of twelve years. It is passing upon millions and even billions of dollars of taxation, and probably is called upon to do work which is of equal importance with, and in my opinion is of greater importance than, the usual work of the District Courts of the United States.

"Appeals lie from its decisions to the Circuit Court of Appeal, or at least they did lie, as Congress had provided, until the Supreme Court decided the *Hobson* case, which so circumscribes the appeals that in substantially all of its cases the decision of the Tax Court today is final.

"There are sixteen members of that Court. During the past two years, there have been appointed to that Court three judges who are over seventy years of age, none of whom had previous experience in the tax field, no experience whatsoever in that field, so far as anybody could ascertain.

"That Court today is only fifty per cent efficient. It is falling behind in its work quite rapidly. It is faced with a great increase in work by reason of the fact that only now will there be coming before it the controversies which are going to arise out of the war years and the high rate of taxes. There is no one to take responsibility for that Court so far as the American lawyer is concerned, except this Association and its Tax Section; and we are greatly interested in that Court and in its personnel. We do not want to see it become a graveyard for men who may deserve a pension.

"I am not saying anything about the legal qualifications of the men who were appointed to the Court. I would concede, for the purpose of argument, that they may be outstanding members of the Bar in the States in which they were appointed. But they have never had any tax experience, and a man who comes to that Court at seventy years of age and more, with no experience in the tax field, is not going to be of a great deal of help in the work of that Court."

The Section's Remedial Resolution

Mr. Phillips moved the adoption of the Section's remedial Resolution, as follows:

> RESOLVED, That the American Bar Association authorizes the officers and Council of the Section of Taxation to bring before the appropriate authorities the considerations that require nominating authorities to exercise single-minded diligence in selecting appointees to the Tax Court who will serve the public in that capacity with the highest possible degree of usefulness.
>
> BE IT FURTHER RESOLVED, That the influence of the Section of Taxation shall not be used to promote the nomination of any special person, but the officers and Council of the Section may submit a list of not less than four names—listed in alphabetical order and without the indication of any preference—of persons who, if they assume this office, would be fully competent; any such submission of names to be accompanied by a statement to the authorities that the list is not submitted in the interest of any one of the persons named but in the public interest, and that the appointment of any equally qualified person, not on

the list, would fully satisfy the concern of the Section that no appointment should be made to the Tax Court of any person unless he has already demonstrated ability and diligence as a lawyer or a judge and unless he is fully qualified physically and mentally to adjust himself to the heavy intellectual burdens incident to the Tax Court office.

The Section's Plan as to the Tax Court Is Approved

Chairman John G. Buchanan, of the new Committee on the Judiciary, informed the House that his Committee had been in consultation with the Section of Taxation on this Resolution, and that that Committee hopes to work with the Section in obtaining qualified appointments to the Tax Court.

Hereward Wake, of Connecticut, moved as a substitute that the matter be referred to the Committee on the Judiciary, to report at the next meeting of the House. This was defeated when put to the vote of the House. The Resolution as presented by Chairman Phillips was adopted by the House.

A second motion was made to rescind the vote to recommit to the Section of International Law the proposed Inter-American Convention on the rights of the author in literary, scientific, and artistic works. Robert C. Watson, of the District of Columbia, as Chairman of the Section of Patent, Trade-mark and Copyright Law urged strongly that there were no advantages in further delay on such a matter or reason for including the Section of International Law on a matter that is primarily concerned with copyrights. The House adhered to its previous reference.

Resolutions Adopted by the Assembly Are Acted On

Secretary Stecher placed before the House for its action three Resolutions which had been adopted by the Assembly. The first Resolution, offered from the floor in the Assembly by Kenneth Teasdale, of Missouri, related to the World Court, the Morse Resolution (S. Res. 196), the Connally amendment, and the American Declaration accepting the jurisdiction of the Court. It is published in the proceedings of the Assembly.

The Connally Amendment as to the World Court

"Yesterday before the Assembly", said Mr. Teasdale, "I outlined the considerations which caused me to file this Resolution. I pointed out that the Connally Amendment of the Morse Resolution (S. Res. 196) with its recital that the United States will itself determine whether or not the Court has jurisdiction over a dispute, is illegal because it is directly contrary to the Statute of the Court, which says that in event of a dispute as to jurisdiction, the matter shall be settled by the decision of the Court. The American Declaration is not now an acceptance of the Statute in the terms which the Statute provides and offers.

"It is further illegal in that it is a unilateral attempt to amend the Statute of the Court, whereas the Statute of the Court, in its Section 69, provides that it can be amended only in the manner the Charter itself can be amended.

"I further pointed out that it is repugnant to our conception of the judicial process. We do not conceive that the judicial process permits a litigant, after a dispute has arisen, to deny or to determine whether or not the Court has jurisdiction of it. The amendment betrays a lack of confidence on the part of the United States in the Charter and in one of its primary organs, the International Court of Justice. It tends to undermine the prestige of that Court and departs from the purposes we have outlined, time and again, that the United States shall be a leader in the matter of settlement of international disputes by the processes of law and by the judicial processes of the Court."

Present Action by the House Is Opposed

William L. Ransom, of New York, Chairman of the Association's Committee on The United Nations, in support of a motion which he made that the Resolution be held for action at the mid-year meeting of the House, said, in part:

"I do not rise to the purpose of arguing the Connally amendment. I am one of those who regretted its inclusion. What I bring to your attention is a very practical angle, in the present tense, which I hope will appeal to you of this House.

"You have, by your unanimous voice and vote here, approved and supported foreign policy of the United States as it is presently being conducted. You have hailed with satisfaction the American acceptance of the jurisdiction of the Court, and, in the present tense, the foreign policy of the United States as expressed by its President, its Secretary of State, and by nearly all the members of the Senate, including Senator Vandenburg and Senator Connally. As long as the critical juncture in world affairs is what it is today, and as long as the attitude of some Nations as to exercise of the 'veto' is what it has been and is, that foreign policy of our country includes the Connally amendment.

"What is our practical situation today? Public opinion in this country will develop and crystallize on this question. Your JOURNAL is publishing a notable series of articles on it. Several have already appeared. Senator Morse, who led the fight for American acceptance of the jurisdiction of the World Court, explains in our November issue the reasons why he, the man who led this fight for us, is not disturbed by the presence of the Connally Amendment in the American Declaration. In our December issue, Judge Manley Hudson will have an article explaining why, as a long-run proposition, we should try to get rid of the amendment.

"The new Congress does not meet until January and will have much to do when it meets. I say to you that as a practical matter there is no chance of a reconsideration, at this time, of the inclusion of the Connally amendment in the American Declaration.

"There is the angle, which I will not undertake to debate this morn-

ing, that in the opinion of some very able constitutional and international lawyers, there would be no power on the part of the United States to modify its Declaration without the consent of every other Nation which has filed a Declaration. I am not sure I agree with that opinion. These men think the United States will have to wait until it can give a notice of termination and then file a new Declaration."

Action as to the Connally Amendment Is Deferred

"What I am saying to you, however, is this, in substance: This is too big a question to decide without full debate. Your Committee, in which you have shown confidence by your unanimous action, discussed the Connally amendment in its report this week (32 A.B.A.J. 873). Your Committee was unanimously of the opinion that it would be unwise at this time to bring forward a resolution on this subject.

"A majority of your Committee is opposed to the Connally amendment, but our timing would be bad if we keep clouding, with resolutions of this sort, the issues being debated while the delegates at Flushing Meadows are holding in their hands the future of international cooperation, peace and law."

Closing in support of his resolution, Mr. Teasdale said: "They say it is untimely. Is it ever untimely to be honorable? Is it ever untimely to carry out your own professed ideals and objectives? It would be untimely to defer this because this House has approved the Charter and we have approved the Statute, and we have twice, by unanimous vote, favored compulsory adherence to the Court."

Upon being put to the vote of the House, the motion to defer consideration until the mid-year meeting was carried by a vote of 35 to 26 (32 A.B.A.J. 874).

Adversary Access to a Lawyer's Files

The second Resolution adopted by the Assembly, presented by James W. Ryan, of New York, was amended by the House of Delegates by striking the preamble clauses, so that the Resolution as adopted by the House reads as follows:

> BE IT RESOLVED, that the American Bar Association in Annual Convention assembled, disapproves the amendment to Rule 30(b) of the Federal Rules proposed on August 26, 1946, by the Advisory Committee of the Supreme Court on Federal Rules of Civil Procedure.
>
> BE IT FURTHER RESOLVED, That the matter be referred to the Committee on Jurisprudence and Law Reform for further action and in cooperation with the Advisory Committee of the Supreme Court on Federal Rules of Civil Procedure.

Mr. Ryan made a spirited effort to retain his preamble clauses.

Other Resolutions Are Adopted

Secretary Stecher read next the Resolution offered in the Assembly by Murray Seasongood, of Ohio.

In the Assembly, a motion was adopted in which the Assembly expressed its approval of the Resolution and referred it to the Committee on Jurisprudence and Law Reform for implementation. The vote of the House concurred in the action of the Assembly on this question.

The following Resolution submitted in the House by John Kirkland Clark, of New York, was on the recommendation of the Committee on Draft, referred to the Section of Administrative Law:

> RESOLVED, That the Association create a special committee on the Food, Drug and Cosmetic Law to consider the desirability of the formation of a new and permanent committee of the Association, or a section of the Food, Drug and Cosmetic Law, and report to the Association thereon.

The following amendment, indicated by the italics, to the By-Laws of the Section of Judicial Administration, was approved by the House:

> Article II. *Membership.* Any member of the American Bar Association who has served or who is serving as the judge of any court of record, federal or State, district or municipal, in the United States or the territories, dependencies or possessions thereof, or as a member of any judicial council in any of the several States or as any court administrative officer, *or who is a member of any committee of the American Bar Association or a State Bar Association, the duties of which relate to judicial administration or improving the administration of justice* shall, upon request to the Secretary of this Section be enrolled as a member of this Section. Members so enrolled shall constitute the members of the Section.

The Section of Municipal Law submitted the following Resolution which was adopted, after amendments from the floor, so that it read as follows:

> WHEREAS, the subject of municipal corporation or local government law is one of great practical and civic importance:
>
> RESOLVED, That it is the sense of the Section of Municipal Law of the American Bar Association that the subject of municipal corporation or local government law should be favorably considered for possible inclusion in law school curricula and in requirements for admission to the Bar; and
>
> RESOLVED, FURTHER, That the Section requests the House of Delegates to refer this resolution to the Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners with a view to obtaining the concurrence of that Section and that Conference and the ultimate concurrence of the Association.

The report of the Board of Elections, presented by William P. MacCracken, Jr., of the District of Columbia, was received and filed.

Completing its calendar, the House of Delegates received from the Secretary the certification of the unopposed nominations, and then unanimously elected as officers for the ensuing Association year the following, who were heartily acclaimed:

President: Carl B. Rix, Milwaukee, Wisconsin
Chairman of the House of Delegates: Howard L. Barkdull, Cleveland, Ohio
Treasurer: Walter M. Bastian, Washington, D. C. (re-elected)
Secretary: Joseph D. Stecher, Toledo, Ohio (re-elected)

The fourth and concluding session of the House adjourned at 12:30 o'clock.

LAW LISTS

■ Publishers of the law lists and legal directories listed below have received from the Special Committee on Law Lists of the American Bar Association, as to the list of lawyers' names in their 1947 editions, a Certificate of Compliance with the Rules and Standards as to Law Lists.

Commercial Law Lists

A. C. A. List (October, 1946-1947 edition)
Associated Commercial Attorneys List
92 Liberty Street
New York City 6

American Lawyers Quarterly
The American Lawyers Company
1712 N. B. C. Building
Cleveland 14, Ohio

Attorneys List
United States Fidelity & Guaranty Company
Redwood and Calvert Streets
Baltimore 3, Maryland

B. A. Law List
The B. A. Law List Company
161 West Wisconsin Avenue
Milwaukee 3, Wisconsin

Clearing House Quarterly
Attorneys National Clearing House Co.
Fawkes Building
Minneapolis 3, Minnesota

The Columbia List
The Columbia Directory Company
320 Broadway
New York City 7

The Commercial Bar
The Commercial Bar, Inc.
521 Fifth Avenue
New York City 17

C-R-C Attorney Directory
The C-R-C Law List Company, Inc.
50 Church Street
New York City 7

Forwarders List of Attorneys
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

The General Bar
The General Bar, Inc.
36 West 44th Street
New York City 18

International Lawyers Law List
International Lawyers Company, Inc.
33 West 42nd Street
New York City 18

The Mercantile Adjuster
The Mercantile Adjuster Publishing Company
10 South La Salle Street
Chicago 3, Illinois

The National List
The National List, Inc.
75 West Street
New York City 6

Rand McNally List of Bank Recommended Attorneys
Rand McNally & Company
536 South Clark Street
Chicago 5, Illinois

The United Law List
The United Law List Company, Inc.
280 Broadway
New York City 7

Wright-Holmes Law List
Wright-Holmes Corporation
225 West 34th Street
New York City 1

Zone Law List
Zone Law List Publishing Company, Inc.
Franklin American Trust Building
315 North Seventh Street
St. Louis 1, Missouri

Directory of Commercial Attorneys

American Lawyers Annual
The American Lawyers Annual Company
1715 N. B. C. Building
Cleveland 14, Ohio

General Law Lists

American Bank Attorneys
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

The American Bar
The James C. Fifield Company
1645 Hennepin Avenue
Minneapolis 3, Minnesota

The Bar Register
The Bar Register Company, Inc.
One Prospect Street
Summit 1, New Jersey

Campbell's List
Campbell's List, Inc.
140 Nassau Street
New York City 7

Corporation Lawyers Directory
Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

The Lawyers Directory
The Lawyers Directory, Inc.
18 East Fourth Street
Cincinnati 2, Ohio

The Lawyers List
Law List Publishing Company
111 Fifth Avenue
New York City 3

Russell Law List
Russell Law List
527 Fifth Avenue
New York City 7

General Legal Directory

Martindale-Hubbell Law Directory
Martindale-Hubbell, Inc.
One Prospect Street
Summit 1, New Jersey

Insurance Law Lists

Best's Recommended Insurance Attorneys
Alfred M. Best Company, Inc.
75 Fulton Street
New York City 7

Hine's Insurance Counsel
Hine's Legal Directory, Inc.
38 South Dearborn Street
Chicago 3, Illinois

The Insurance Bar
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

The Underwriters List
Underwriters List Publishing Co.
175 West Jackson Boulevard
Chicago 4, Illinois

Probate Law Lists

Recommended Probate Counsel
Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

Sullivan's Probate Directory
Sullivan's Law Directory
714 South Dearborn Street
Chicago 5, Illinois

State Legal Directories

The following state legal directories published by
The Legal Directories Publishing Company
5225 Wilshire Boulevard
Los Angeles 36, California

Indiana Legal Directory
Iowa Legal Directory
Kansas Legal Directory

Missouri Legal Directory
Ohio Legal Directory
Pacific Coast Legal Directory for States of Arizona, California, Nevada, Oregon and Washington
Texas Legal Directory
Wisconsin Legal Directory

Foreign Law Lists

Canada Bonded Attorney
Canada Bonded Attorney & Legal Directory, Ltd.
57 Bloor Street West
Toronto 5, Ontario, Canada

Canada Legal Directory
Canada Bonded Attorney & Legal Directory, Ltd.
57 Bloor Street West
Toronto 5, Ontario, Canada

Canadian Credit Men's Commercial Law and Legal Directory
Canadian Credit Men's Trust Association, Ltd.
456 Main Street
Winnipeg, Manitoba, Canada

Canadian Law List
Canadian Law List Publishing Company
24 Adelaide Street, East
Toronto, Ontario, Canada

The International Law List
L. Corper-Mordaunt & Company
104 High Holborn
London, W. C. 1, England

Kime's International Law Directory
Kime's International Law Directory, Ltd.
5 Perrin's Court
London, N. W. 3, England

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Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1947 Annual Meeting and ending at the adjournment of the Annual Meeting in 1950:

Alabama
California
Florida
Hawaii
Kansas
Kentucky
Massachusetts
Missouri
New Mexico
North Carolina
North Dakota
Pennsylvania
Tennessee
Territorial Group
Vermont
Virginia
Wisconsin

Election will be held in the State of Missouri for State Delegate to fill the vacancy in the term expiring at the Adjournment of the 1947 Annual Meeting.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. Nominating petitions for all State Delegates to be elected in 1947 must be filed with the Board of Elections not later than April 25, 1947. Forms of nominating petitions for the three-year term, and separate forms of nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. **Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. on April 25, 1947.**

Attention is called to Section 5, Article VI of the Constitution which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Additional signatures received after a petition has been published will not be printed in the JOURNAL. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the States in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS

Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Laurent K. Varnum

(Continued from page 109)

mate source of law was apparent, as indicated in his argument to an Athenian jury that all men ought to obey law because it is a discovery and gift of God.[20] It appears in Empedocles, to whom the law against killing was not limited in its jurisdiction,

> "Nay, but an all-embracing law,
> through the realms of the sky
> Unbroken it stretcheth, and over
> the earth's immensity."[21]

And in Sophocles, we find Antigone challenging a tyrannic decree upon the ground of "the unwritten law divine, immutable, eternal."[22]

The doctrine next appears among the Stoics who, bridging the cultures of Greece and Rome, made a momentous contribution to political thought; for they deduced from the doctrine the unity of human nature and the equality of all men and advocated the brotherhood of man in a common citizenship of one world.[23]

"The Higher Law" in Roman Law

From Greece and the Stoics, the doctrine became incorporated into the Roman law, with the result that it can be felt throughout the Western world even to the present day. This was accomplished largely through the writings of Cicero. "True law," he wrote, "is right reason in agreement with Nature; it is of universal application, unchanging and everlasting . . . We cannot be freed from its obligations by senate or people . . . And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge."[24] And to Cicero the state is no mere assemblage of human beings, but a "partnership in law." In fact, it owes its very origin to law, which is coeval with God and known through the nature of man.[25]

Propositions such as these, so suggestive of the primacy of human personality, are indicative of the fact that here in ancient Rome was the beginning of modern political theory, and that the doctrine of the rights of man which was to assert itself with revolutionary explosiveness in the eighteenth century and which constitutes the basis of present-day democracy, had its foundation in these ancient writings, especially in those of the great lawyer who wrote two thousand years ago.[26]

The doctrine was perpetuated by the later Roman jurists—by Gaius[27] in the second century, Ulpian [28] in the third, Justinian[29] in the sixth, and Gratian[30] in the twelfth.

Side by side with this development, it received incalculable weight from its adoption by religion, as illustrated in the writings of the early Christian fathers, Saints Paul and Augustine, Ambrose and Jerome.[31]

In the middle ages the doctrine received development which was responsible for further political progress of which today we are the heirs. The outstanding thinker of this period was the great mediaeval philosopher St. Thomas Aquinas, who wrote that the rational creature, being subject to divine providence, has a share of Eternal Reason, "whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law." According to St. Thomas, therefore, all man-made laws must conform to this law of nature, and "if on any point (a man-made law) is in conflict with the law of nature, it at once ceases to be a law; it is a mere perversion of law."[32]

As a result of teaching such as this, it was recognized throughout the middle ages that the natural law was antecedent and paramount to the state in every way, and that it stood above all earthly powers, above king and emperor, above pope and people.[33] Allied with this was the mediaeval doctrine that rulership was based upon the consent of the governed. It was the prevalence in mediaeval times of doctrines such as these which caused the historian Carlyle to say that the great representative machinery of modern government "would have been impossible, as its appearance would be unintelligible, if its foundations had not been laid deep in the principles of mediaeval society, and especially in the principle that all authority is the authority of the community;"[34] and which caused Sir Frederick Pollock to say that the mediaeval theory of natural law "never ceased to be essentially rationalist and progressive"

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20. *Speech Against Aristogeiton*, I, 774; The Loeb Classical Library, Demosthenes, pages 524, 525. Pound, *Jubilee Law Lectures*, Washington, D. C., 1939, page 85.

21. Quoted by Aristotle, *Rhetorica*, I, 13. Aristotle also quotes Alcidamas who says, in his Messeniac oration: "God has left all men free; Nature has made no man a slave."

22. *Antigone*, 456, 7.

23. See A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, Vol. I, Part I, chapters 1 and 11; Charles H. McIlwain, *op. cit.*, pages 106, 114 ff. These two works are filled with valuable discussion of early natural law theory, and I am indebted to them for some references.

24. *De Republica*, III, 22.

25. *De Republica*, I, 32; I, 26. *De Leg.*, i. 6. 19, 20; 10. 28; 15. 42; 16. 45.

26. A. J. Carlyle, *op. cit.*, Vol. I, page 9.

27. *Institutes*, i. I; ii. 65, 66.

28. *Dig.*, i. 1. 1, 2, 3, 4. As far as I know, it was Ulpian who first expressed the basic principles of the natural law in the three propositions: live rightly, harm no one and render to each his own. *Dig.*, i. 1. 10.

29. *Digest*, and Institutes. For extracts related to natural law, see McIlwain, *op. cit.*, pages 124 ff. See also, Pound, *op. cit.*, page 47.

30. Carlyle, *op. cit.*, Vol. II, pages 98 ff. Gratian divided law into *jus naturale, jus gentium and jus civile*. Pound, *op. cit.*, pages 76 ff.

31. St. Paul, *Romans* ii, 12-14. Carlyle, *op. cit.*, Vol. I, pages 83, 105 ff. William A. Robson, *Civilisation and the Growth of Law* (N. Y.: Macmillan Co.—1935), page 218. *Natural Law, a Christian Reconsideration*, Ed. by Vidler and Whitehouse (London: S. C. M. Press—1946) pages 13, 14.

32. *Summa Theologica*, Part II, I Q 91, art. 2, Q 95, art. 2.

33. Otto Gierke, *Political Theories of the Middle Age*, tr. by F. W. Maitland (Cambridge—1938), page 75. Gierke writes: "Thomas Aquinas drew the great outlines (of natural law) for the following centuries . . . however many disputes there might be touching the origin of Natural Law and the ground of its obligatory force, all were agreed that there was Natural Law, which . . . was true and perfectly binding law. Men supposed therefore that before the State existed the *Lex Naturalis* already prevailed as an obligatory statute, and that immediately or mediately from this flowed those rules of right to which the State owed even the possibility of its own rightful origin. And men also taught that the highest power on earth was subject to the rules of Natural Law. They stood above the Pope and above the Kaiser, above the Ruler and above the Sovereign People, nay above the whole Community of Mortals. Neither statute nor act of government, neither resolution of the People nor custom could break the bounds that thus were set. Whatever contradicted the eternal and immutable principles of Natural Law was utterly void and would bind no one."

34. *American Historical Review*, Oct., 1913, page 6.

and that it is modern aberrations which "have led to a widespread belief that the Law of Nature is only a cloak for arbitrary dogmas or fancies."[35]

At the close of the middle ages, the doctrine continued to actuate the thought of Europe. The Italian St. Robert Bellarmine and the Spaniard Suarez utilized it to disprove the divine right of kings.[36] In the hands of the Spanish jurist theologians, de Vitoria and the same Suarez, it formed the basis for modern international law and gave to those two thinkers the now recognized title of founders of that law.[37]

"The Higher Law" Came to America

From mediaeval sources it came to England, where it characterized the writings of such men as Hooker[38] and Sydney[39] and of the jurists Bracton[40] and Fortescue,[41] Coke[42] and Blackstone[43] and Pollock.[44]

Finally it came to America, where it permeated the writings of the Founding Fathers—of Wilson[45] and Hamilton,[46] of Adams,[47] Dickinson[48] and Otis;[49] while from the pen of Jefferson it received classic and, let us hope immortal, expression in the famous preamble to the Declaration that all men are created equal and that they are endowed by their Creator with certain inalienable rights and that the purpose of government is to secure these rights.

Akin to this great expression in the Declaration is the equally beautiful and powerful statement of Hamilton: "The sacred rights of mankind are not to be rummaged for among old records or musty parchments. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power."[50] It was this great concept which was given body and visibility by incorporation into our Bill of Rights, especially in the due process clause whereby the life, liberty and property of every least man in the land was brought within its protecting arms.

"A Moral Power Higher than the State"

And now, after a century and a half of our National life, it still lives in the expressions of those who see in this principle the bulwark of our liberty and the source of our Nation's strength. Among these expressions is that of Chief Judge Irving Lehman of the New York Court of Appeals: "Statesman, prelate and judge, Protestant, Catholic and Jew, are united in the conviction that the inalienable rights of the individual, formulated and assured by our law, rest upon a foundation eternal and immutable because it is divine. There lies America's unity."[51] And in this very year, Mr. Justice Douglas, to the credit of himself and of the great Court of which he is a member, said in a recent case: "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State."[52]

This is our birthright. This is what is at stake in America today. And in this matter we are in the most unyielding dilemma. For if there is no higher law, there is no basis for saying that any man-made law is unjust, and if an act of Congress, benign in purpose and content and enacted within the limits of the Constitution, is called a law, by the same token the most vicious enactment of the late Nazi government must be called a law; and in such case, the ultimate reason for things, as Justice Holmes himself conceded, is force.[53] If there is no natural law, there are no natural rights; and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses—his life, his liberty and his property—are held by sufferance of government, and in that case it is inevitable that government will some day find it expedient to take away what is held by a title such as that. And if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny..

What has preserved America from this teaching so far? My own answer

35. *Essays in the Law* (London: Macmillan Co.—1922), page 32.

36. Bellarmine, *de Laicis*, C. VI. Suarez, *Defensio Fidei*, L. III, C. I, n. 4, 7. *De Leg.*, L. III, C. I, n. 3-5, C. III, n. 3. See Obering, *The Philosophy of Law of James Wilson*, Washington, D. C., pages 177 ff., from whom these references were obtained.

37. Pound, *op. cit.*, page 81.

38. *Book I of the Laws of Ecclesiastical Polity* (Oxford: Clarendon Press—1896). Coker, *Readings in Political Philosophy* (N. Y.: Macmillan Co.—1938), page 385 ff.

39. *Discourses Concerning Government*, N. Y., 1805. ". . . that which is not just is not law and that which is not law ought not to be obeyed." Book III, chapter 11.

40. *De Legibus et Consuetudinibus Angliae*, III, 9, 2, fol. 107 b. Charles Grove Haines, *The Revival of Natural Law Concepts* (Harvard University Press—1930), pages 32, 33. For the student of natural law, this work of Professor Haines contains an invaluable collection of historical references. Carlyle, *op. cit.*, Vol. III, pages 34 ff.

41. See McIlwain, *op. cit.*, pages 361 ff. Pound, *op. cit.*, p. 79: "Thus Sir John Fortescue, writing in the third quarter of the fourteenth century, defines a positive law, in effect, as a sanction added by the state to a precept of natural law."

42. See Haines, *op. cit.*, pages 33 ff, 107. Ben W. Palmer, *Edward Coke, Champion of Liberty*, American Bar Association Journal, March, 1946, pages 135, 137.

43. *Commentaries*, I, 41-43.

44. *The History of the Law of Nature*, Columbia Law Review, Vol. I, page 11; *Essays in the Law*, above cited.

45. *The Works of James Wilson*, Ed. by James DeWitt Andrews (Chicago—1896), Vol. I, pages 91 ff., 275, 276, Vol. II, 3, 297 ff.

46. Hamilton, Works, Fed. Ed., Ed. by Lodge, Vol. I, pages 61 ff (The Farmer Refuted).

47. Samuel Adams, *Writings*, Ed. by Cushing, Vol. I, page 23. Wells, *Life and Public Services of Samuel Adams*, Vol. I, page 502, quoted by Randolph G. Adams, *Political Ideas of the American Revolution*, page 169. See also John Adams, *Works*, Vol. III, page 462, quoted by Benjamin F. Wright, Jr., *American Interpretations of Natural Law* (Harvard University Press—1931), pages 74, 75. *Works*, Vol. III, pages 449, quoted by Haines, *op. cit.*, page 54.

48. *Writings*, quoted by Wright, *op. cit.*, pages 77, 78. Ford, Pamphlets, pages 175, 176, quoted by Wright, *op. cit.*, page 144.

49. *The Rights of the British Colonies*, page 8.

50. *Op. Cit.*, page 113.

51. *The Influence of Judge Cardozo on the Common Law*, first annual Benjamin N. Cardozo Lecture, delivered October 28, 1941, before the Association of the Bar of the City of New York.

52. *Girouard* v. *U. S.* (Apr. 22, 1946), 90 U. S. Supreme Court Law ed. Advance Opinions, 776, 780, 781. This swift historical sketch is, of course, not exhaustive, but merely illustrative. Moreover, there is no implication that all the thinkers I have mentioned conceived of natural law in precisely the same way or in all respects correctly. I have offered the sketch merely to indicate the fact that in one form or another the doctrine of a higher or natural law transcending man-made laws has been maintained by thinkers of various callings from earliest times; that it has served man's cherished ideals of freedom and justice; and that together with religion it has long been looked upon as the only basis for the moral order.

53. *Holmes-Pollock Letters* (Harvard University Press—1944), Vol. 2, pages 36, 212, 213.

4 The Higher Law

is this: I think it is a carry-over of the early American tradition. We had a good start in theory of state and of law, but the theorists have reversed themselves, and we are now living in the declining momentum of the original theory.

How long can our tradition resist this teaching? Who can say? But this much is plain, that he who obtains control over men's minds will in the end master their institutions.[54]

Substance of Liberty Denied in Our Philosophy

The man in the street still believes in liberty; and we are still surrounded by the signs of liberty, the flag, Independence Day, the inscriptions on our public buildings and on our coinage. But these are merely the habits, the symbols and nomenclature of liberty. And we delude ourselves if we trust in such habits and symbols while the substance of our liberty is being denied in our philosophy.

Truth is like liberty. Its price is eternal vigilance. And against the teaching which I have described, democracy as a mere mechanism[55] is no protection. For democracy has an Achilles heel of vulnerability; by virtue of its freedom, it can exchange that freedom for servility. Ideas must be overcome by ideas.

The Duty of Men of the Law

The duty to America, and especially to us of the law, is plain. It is to reiterate the doctrines upon which our country was founded and upon which alone justice and liberty may be based. We enter upon that duty at a late hour. As stated by a patriot of an earlier day: "It may be too late for Americans to learn the lesson—nevertheless, it is a lesson of truth, and of unspeakably important truth that no people can be secure in their rights any further than they believe that their rights are derived from God; nor any further than they believe that laws to be valid and obligatory, must be laws for the protection, instead of the destruction, of rights."[56] These words, spoken by Gerrit Smith in his argument on the Fugitive Slave Law of 1852, have come to life again today. Providence gave vigor to the warning of that day. May Providence inspire a similar warning today, and make it fruitful, and save the vanishing tradition of America.

54. Sir Paul Vinogradoff, *Common Sense in Law* (London—1914), page 245, quoted by Haines, *op. cit.*, page 319.

55. By this I mean that by popular vote people can install a dictator or other form of government hostile to their interests and therefore opposed to essential ideals of democracy.

56. *Argument on the Fugitive Slave Law* (1852), page 3, quoted by Wright, *op. cit.*, page 214.

8 The Judicial Conference

(Continued from page 121)

ruptcy Act[4] and recommended their early enactment by the Congress.

After considering the proposals of the Committee for amending Section 64b, the Conference referred the matter back to the Committee, with instructions that the recommendations be circulated throughout the judiciary in conformance with Conference policy, and that a further report to the Conference be submitted at its special session in the spring of 1947.

It was ordered that, in the event legislation is proposed under which Section 75 of the Bankruptcy Act would become permanent, the Conference recommend the abolishment of the offices of Conciliation Commissioner and Supervising Conciliation Commissioner and the absorption of their duties and functions by the Referees in Bankruptcy. The Committee on Bankruptcy Administration and the Director of the Administrative Office of the United States Courts were authorized, in the event such legislation is proposed, to inform the Congress of the Conference's position.

With respect to the practice of transferring funds from one Referee's office to another within the same district, the Conference adopted the following resolution:

> The Conference having been advised that under present practice, transfers of funds between Referees in the same district have been permitted in order to provide indemnity monies for Referees in whose accounts deficits have been created, and that such deficits in some instances may not have been justified,
>
> IT IS, THEREFORE, RESOLVED, That it is the sense of this Conference that transfers of indemnity funds between Referees in a district should not be permitted without a prior audit of the offices involved by the Administrative Office of the United States Courts.

4. Conference Reports (September, 1944), pages 9, 10; (1945), pages 16, 17.

With respect to office quarters for Referees, the Conference adopted the following resolution:

> RESOLVED, That the Judicial Conference considers it very desirable for the Referees in Bankruptcy to have quarters in federal office buildings and recommends that wherever possible provision of this nature be made.

It directed that the Director of the Administrative Office of the United States Courts confer with the custodians of various federal office buildings in an effort to carry out the wishes of the Conference with respect to office facilities for Referees.

The Committee was authorized to continue its study in connection with conditional discharges and summary jurisdiction.

Judicial Review of Orders of Certain Administrative Agencies

The Conference's Consolidated Committees on Appellate Review of Orders of the Interstate Commerce Commission and other Administrative Orders, and on Three-Judge-Court Procedure, submitted separate reports covering the following subjects:

Interstate Commerce Commission.—The bill previously approved by the Conference[5] and recommended for enactment provided solely for review of orders of the Interstate Commerce Commission. The Committee, pursuant to request of the United States Maritime Commission, proposed an amendment which would bring orders of that agency within the provisions of the bill. The Conference approved the bill as amended, and recommended its early enactment.

Federal Communications Commission and the Secretary of Agriculture.—The Committee submitted a draft of a bill to give to the Circuit Courts of Appeals (including the United States Court of Appeals for the District of Columbia) exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Federal Communications Commission made under the Communications Act of 1934 as amended, and certain orders of the Secretary of Agriculture made under the Packers and Stockyards Act of 1921, as amended, and under the Perishable Agricultural Commodities Act of 1930 as amended, and providing for review in the Supreme Court of the United States upon writ of certiorari. The Conference adopted an amendment to the venue section of the Committee's bill, fixing alternative jurisdiction in the United States Court of Appeals for the District of Columbia, and recommended the prompt enactment of the amended bill.

Amendments as to Three-Judge-Court Procedure

Two amendments to the draft of a bill previously approved by the Conference[6] were submitted by the Committee. The first would retain existing statutory provisions which require that at least two judges join in the granting of a temporary stay or suspension of an order of the Interstate Commerce Commission. The second would require that action be brought by or against the Commission with leave to the United States to intervene, rather than against the United States with leave to the Commission to intervene. The Conference adopted the amendments and recommended the enactment of the bill, as amended.

Other Bills Considered and Approved

The Conference approved, with some amendments, the draft of a bill submitted by the Committee of the Conference, to provide a method of treatment, care, and custody of insane persons charged with or convicted of offenses against the United States.

Pursuant to direction of the Conference,[7] the Committee on Punishment for Crime submitted a draft bill incorporating the provisions of the sentencing bill affecting youthful offenders which had heretofore been approved by the Conference[8] and providing also for the creation of a Federal Youth Authority. The bill in no way affects the existing power of the Courts to suspend the imposition or execution of any sentence and place the offender on probation, nor does it affect in any way the provisions of the Federal Juvenile Delinquency Act or the enforcement or administration of that Act.

The Conference adopted certain amendments to the bill proposed by the Committee respecting the formality of findings of the Court, approved the bill as amended, and recommended its early enactment.

The Committee on the Removal of Civil Disabilities of Probationers Fulfilling the Terms of their Probation recommended that the bill heretofore approved by the Conference[9] be amended so that the Act will be applicable to all persons on probation on the effective date of the Act; that persons discharged from probation prior arrest may be issued only during a maximum period of five years (the maximum period of probation). In the event of revocation of probation, the Court may, if there was no previous sentence, impose any sentence which might previously have been imposed, or, if there was previous sentence, confirm it or set it aside and impose a new sentence not to exceed the previous sentence.

The Conference approved the report and draft of the bill submitted, and ordered that it be forwarded to the Congress with recommendations for its early enactment.

The Use of Trial Memoranda in Criminal Cases

The Conference, after consideration of the report of the Committee appointed to study the subject-matter, disapproved the practice, prevalent in some districts, by which trial judges in criminal cases receive from

5. Conference Report (1945), pages 17-18.

6. Conference Reports (1943), page 20; (1945), page 18.

7. Conference Report (1945), page 22.

8. Conference Reports (1943), page 26; (September, 1944), pages 15-16; (1945), page 22.

9. Conference Reports (1942), page 12; (September, 1944), pages 21-22; (1945), page 25.

the attorney on one side a brief or trial memorandum that has not been furnished to the attorney on the other side. The Conference recommended the immediate discontinuance of such a practice.

Improving Habeas Corpus Procedure

The Conference renewed its previous approval and recommendations of the procedural bill (S. 1452, H. R. 4232, 79th Cong.)[10] The jurisdictional bill, as amended (H. R. 6723, 79th Cong.), was referred back to the Committee on Habeas Corpus Procedure with instructions that the bill and the report of the Committee be circulated among the judiciary in conformance with Conference policy, and that a further report of the Committee be submitted to the Conference at its next session.

The Conference reaffirmed its approval and recommendations heretofore given[11] to bills[12] providing, *inter alia*, for the establishment of uniform standards of qualifications for federal jurors; for improved provisions for jury commissions, and some increase in the compensation of the members thereof; for the establishment of a uniform method of selection of jurors; and for increase in the travel and subsistence allowance of jurors.

The approval heretofore given[13] to legislation proposed by the Committee to Consider the Adequacy of Existing Provisions for the Protection of the Rights of Indigent Litigants in the Federal Courts, was reaffirmed by the Conference. The Conference was of the opinion, however, that the proposal should be broadened so as to make available to indigent defendants in criminal cases in the Courts of Appeals the services of the public defender and counsel provided for under section 3 of the proposed bill; and, further, to provide counsel for indigent persons applying for habeas corpus.

The matter was therefore referred back to the Committee, with instructions that consideration be given the Conference's suggestions and that a further report by the Committee be submitted at the special session of the Conference in the spring of 1947.

More Detailed Information in Judicial Statistics

The report of the Committee on Judicial Statistics, as presented by Mr. Shafroth of the Administrative Office, was approved by the Conference. Pursuant to the Committee's request, the Conference authorized the Director of the Administrative Office to request that the names of the trial judges be reflected in the monthly trial reports of the District Judges, and urged compliance with such request by the Courts. It also directed the Administrative Office to publish separately, wherever feasible, the judicial statistics concerning the following parts of districts or places of holding Court: Northern District of Ohio, Eastern and Western Divisions; Southern District of Ohio, Western Division (Cincinnati), Eastern and Western Divisions (Dayton), and Eastern Division (Columbus); Eastern District of Tennessee, Northern and Northeastern Divisions to be combined for statistical purposes and statistics for those divisions to be published separately from the statistics for the Southern and Winchester Divisions. It was understood that the various judges directly concerned approved this plan of reporting their statistics.

In view of the continuing need for further study and research with respect to the subject-matter, the Conference designated the present Committee on Judicial Statistics a standing committee of the Conference.

Outside Assignments of Judges

The Committee designated by the Conference to study the subject-matter submitted a comprehensive report reviewing the development of the assignment practice, and analyzing the effectiveness of present methods of "outside-of-circuit" assignments. Statistics were presented supporting the view of the Committee that the practice at present falls considerably short of its possibilities. It was emphasized that, whatever the plan may be, it would still be unsuccessful unless the whole of the judiciary was in accord and cooperated in its operation.

As a general plan of operation, it being understood that it will be necessary to continue to make arrangements for assignments without regard to the plan in emergencies, the Committee recommended the adoption of the following procedure:

(a) The Director will ask the Senior Circuit Judge of each circuit, on or before May 1st of each year, how many visiting judges he thinks he will need in the following year, and in what districts and at what times he will need them.

(b) When the judges have answered, the Director will ask the Senior Circuit Judges what judges may be available for service outside their circuits in the following year, and will ask them for their consent that he may write to any such judges directly.

(c) The Director will then try to arrange with any of such judges to fill the requirements of such circuits as need help; will inform the Chief Justice of those whom he has persuaded; and will see to it that the proper certificates and other documents are executed.

(d) All this will, if possible, be done during the summer months, so that it will be completed by the opening of the autumn terms.

The Conference approved the report and recommendations of the Committee, directed the Director of the Administrative Office of the United States Courts to adopt the system of procedure outlined, and earnestly requested all judges to conform to the system.

Amendments of the Admiralty Rules

The Committee appointed to consider amendments to Rules 51, 52,

10. Conference Reports (1943), pages 22-23; (1944), page 22; (1945), page 28.

11. Conference Reports (1943), pages 15-17, (September, 1944), page 21.

12. HR 3379, 3380, 3381, S. 1244, 1245, 1246—79th Congress.

13. Conference Report (1945), page 21.

53, and 54 of the Supreme Court Rules in Admiralty, proposed by the Maritime Law Association of the United States, submitted its report. It stated that, for the purpose of clarification, certain changes were made in the amendments, but that, in substance, it had followed the Association's suggestions, and that the principal purpose of the amendments was to provide uniformity in limitation proceedings.

After consideration of the report, the Conference requested the Committee to amend its proposed Rule 54 by adding a provision that would permit the Court, in its discretion, to transfer the proceedings to any district for the convenience of the parties; that, as so amended, the report and recommendations be submitted to the judiciary in conformance with Conference policy; and that a further report be submitted to the Conference by the Committee.

The Conference unanimously approved a proposed draft of a bill submitted by Chief Justice Groner of the United States Court of Appeals for the District of Columbia, amending present statutes so as to provide annual salaries for the Director and the Assistant Director of the Administrative Office of the United States Courts in the amounts of $15,000 and $12,500, respectively, and recommended its prompt enactment by the Congress.

The Conference discussed at length the experiences had under its present procedural policy[14] with respect to the circulation throughout the judiciary of proposed legislation affecting district judges or district Courts. It was stated that in some of the circuits the legislative committees for the circuit conferences contemplated under the plan have not been created and, in others, although established they were not functioning in accordance with the plan. The Conference reemphasized the desirability of having the benefit of the views of the full judiciary on such proposals.

Attention was called to the fact that sometimes the circuit conferences are held at a season which precludes action by these circuits upon many matters considered in the Senior Conference.

The Conference adopted the following resolutions regarding these matters, and urged compliance with the procedure suggested wherever possible:

> RESOLVED, That the Director of the Administrative Office call the attention of the circuit and district judges to the policy of the Conference that each circuit conference appoint a legislative committee to consider proposed legislation affecting district judges or district Courts, so that the Conference may be informed of the views of the district judges and of the circuit conferences.
>
> To this end the Conference requests the circuit conferences to appoint such legislative committees where they have not already been appointed, so that proposed legislation may be given prompt consideration.
>
> For this same purpose the Conference recommends that the circuit conferences be held in the three months, June, July and August, in each year, so that the Conference which meets annually in the week before the first Monday of October, may have the benefit of the views of the circuit conferences.
>
> RESOLVED, That whenever legislation affecting the district Courts or district judges, or any other matter affecting the district judges or district Courts is circulated for comment in accordance with the procedural policy of the Conference, the Director of the Administrative Office is hereby authorized to communicate directly with each senior circuit judge, calling his attention to the fact that the matter is being circulated for consideration.
>
> The Director will again call the attention of the Senior Circuit Judge to all such matters that may be pending as early as possible in advance of the time set for the circuit judicial conference.

The Conference reaffirmed its previous recommendations regarding legislation providing basic authority for the employment of certain personnel of the Courts and urged its early enactment by the next Congress.

The Conference reaffirmed its statement of last year that

> It was the sense of the Conference that the clerks' offices, and the offices of the probation officers of all the federal Courts, also the District Attorneys' and Marshals' offices, should be kept open on Saturday forenoons, with such service provided in the buildings occupied as is satisfactory to the judges of the Courts concerned.

Committees of the Conference Continued

All the present Committees of the Conference, except the Committee on the Library Funds of Certain Circuit Courts of Appeals and the Committee on the Use of Trial Memoranda in Criminal Cases, were continued.

Pursuant to resolution of the Conference, the Chief Justice appointed a Committee on Probation with Special Reference to Juvenile Delinquency. This Committee will study and make recommendations to the Conference relative to the specific problems of juvenile delinquency discussed by the Attorney General, and relative to the general operation of federal probation. The following were designated as members of this Committee: District Judge Harold M. Kennedy, Chairman, District Judges Bower Broaddus, Chase A. Clark, James P. McGranery, Arthur J. Mellott, Clarence Mullins and George C. Sweeney.

The Chief Justice designated District Judge Paul J. McCormick as a member of the Committee on the Court Reporting System, to succeed District Judge A. F. St. Sure, resigned.

The Chief Justice appointed District Judge John McDuffie as an additional member of the Committee on the Statutory Definition of "Felony."

The Conference continued the Committee consisting of the Chief Justice, Judges Biggs, Parker and Stone, and Chief Justice Groner, to advise and assist the Director of the Administrative Office in the performance of his duties.

The Conference declared a recess, subject to the call of the Chief Justice.

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14. Conference Report (1945), pages 8-10.

11

Military Government

(Continued from page 136)

origin must be considered to revert to French ownership, regardless of the means by which the enemy had acquired it, or the nationality of the capturing forces.

A somewhat similar question—one involving extensive repercussions in any number of directions—has more recently arisen in the Soviet Zone of Austria. Under the Potsdam Declaration, Russia was permitted to apply to its reparations claims, German property found in Eastern Austria. It has treated as "German", property which the Germans had confiscated, frequently from Allied interests, following annexation of Austria to Germany.

Complicated Questions as to Property

Following capture by U. S. forces of an extensive cache of fine wines in the German arsenal at Cherbourg, a contention was made in behalf of another nation, that all such captures become property of the Allies, to be divided among them as determined on diplomatic or other high levels. The point arose again, with various claims by various governments, on all conceivable grounds, being asserted to all or parts of a vast hoard of gold captured by United States troops in a German salt mine.

The disentanglement of Austrian from German economic interests, attendant on the reestablishment of Austria as an independent nation, raises legal questions of corporate reorganization and finance, as nice as any ever discussed in the law books.

The solution of problems of restitution of property and property rights, wrongfully taken or transferred during the Nazi regime, frequently under color of law, will unquestionably ultimately result in the establishment of new principles of equity jurisprudence.

Similar examples of literally fascinating legal questions arising in the course of military government, both before and after combat, might be multiplied indefinitely. Many of them, of course, can not be settled with the writing of mere legal opinions.

Some require diplomatic negotiations, and even international conventions. Legal personnel must play the leading roles in such presentations. On the character of their performance, the success of military government operations, and, to a great measure, of the future ability of the nations of the world to live among each other in peace, may largely depend.

14

Supreme Court Reviews

(Cotinued from page 147)

employment, there was no strike or leaving of employment and hence no "labor dispute" within the narrow interpretation of those terms which, they maintained, should be adopted in order to give effect to the remedial purpose of the legislation. The CHIEF JUSTICE in answer cites §5 (c) (2) (A) of the Act which refers to "a strike, lockout, *or other labor dispute*" and says, "Obviously, for the purposes of §5 (c) (2) (A), the term, 'labor dispute', has a broader meaning than that attributed to it by respondents." He finds no reason to believe that the Territorial Legislature intended to give the term any narrower meaning in §5(d), the one under consideration, and therefore concludes that the Commission might properly find a "labor dispute" here presented within the meaning of that section.

On the second question the CHIEF JUSTICE finds evidence to support the Commission's conclusion that the unemployment was "due" to the labor dispute except in the case of the respondents employed by the Alaska Salmon Company. He points out that the other employers "negotiated in good faith and failed to operate in Alaska during the 1940 season only because of their inability to negotiate satisfactory labor agreements before the passing of the deadline dates."

With respect to the question whether there was a labor dispute in "active progress" after the passage of the deadline dates, the third question presented, respondents argued that the dispute must have terminated on those dates since there was no possibility of a settlement thereafter. The CHIEF JUSTICE observes that negotiations did not in fact then terminate but goes on to hold that, even if they had, it would not follow that the Commission's finding must be overturned. He states: "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. . . . The Commission apparently views a dispute as "active" during the continuance of a work stoppage induced by a labor dispute. . . . We see nothing in such a view to require our substituting a different construction from that made by the Commission entrusted with the responsibility of administering the statute."

The CHIEF JUSTICE rejects the conclusion by which the Circuit Court of Appeals determined the case when it answered the fourth question by saying that the dispute was not "at" the Alaskan establishments. He rules: "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore pre-

sented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." He cites the legislature's knowledge that such negotiations were customarily carried on away from the Alaskan establishments and the voluntary entry of the union into negotiations so carried on, and concludes on the merits that, under the circumstances of the case, the dispute was "at" the Alaskan establishments in the sense intended by the Territorial Legislature.

The case was argued by Mr. Marshall P. Madison for Alaska Commission; by Mr. Herbert Resner for Aragan.

National Labor Relations Act — Board's Policy Against Post-election Challenges—Effective Despite Jurisdiction Requirement of Majority Vote for Collective Bargaining Representative — Distinction Between "Objections" and "Challenges" — Representation of Interests of Anti-union Employees

National Labor Relations Board v. *A. J. Tower Co.*, 91 L. ed. Adv. Ops. 245; 67 Sup. Ct. Rep. 324; U. S. Law Week 4109 (No. 60, decided December 23, 1946).

The First Circuit Court of Appeals (152 F.2d 275) set aside an order of the National Labor Relations Board (60 N.L.R.B. 1414) ordering respondent employer to cease and desist from refusing to bargain collectively with a certain union, a labor practice alleged to be unfair in that the union had been designated in an election under the National Labor Relations Act (49 Stat. 449, 29 U.S.C. §151, *et seq.)* by a majority of the employees in the appropriate unit as the exclusive bargaining representative for the unit. After the holding of the election on the question of such designation and the certification of a tally showing a majority of votes in favor of the union, the validity of one of the votes cast had been challenged by the employer on the ground that the voter had not been an employee at the time of the election. The circumstances were such that if the ballot in question were thrown out the result might have been a tie. The regional director had ruled that the employer's right to make such a challenge had been waived and had refused to pass upon it. He had accordingly found that the union was the exclusive representative of the employees. The employer had thereafter refused to bargain collectively with the union and the order under review had been made by the Board. One of the grounds upon which it was based was that the refusal to permit an attack on the voter's status after the results of the election had been announced was "in complete accord with the established principles and policy of the Board" excluding post-election challenges. The ground upon which the Court of Appeals set the order aside was that the choice of the alleged collective bargaining agent by a majority was a jurisdictional prerequisite to a determination that an employer's refusal to bargain with it was an unfair labor practice. On certiorari, the United States Supreme Court reversed.

Mr. Justice MURPHY delivered the opinion of the Court. He rests the decision of the Court in favor of effectiveness of the election "solely on the propriety of the Board's policy against post-election challenges", saying:

"Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process."

Mr. Justice MURPHY remarks that the rule in question is one peculiarly appropriate to the situations confronting the Board in such elections.

He characterizes as misplaced the reliance of the Court of Appeals upon the asserted jurisdictional requirement of a majority vote, pointing out that "the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion" and adding that the "rule prohibiting post-election challenges is one of those rules."

He rejects the contention that a provision in the consent agreement for the election permitting "objections" within five days after the tally permitted the post-election challenge, distinguishing between objections, which "relate to the working of the election mechanism and to the process of counting the ballots", and challenges, which "concern the eligibility of prospective voters."

He finds it impossible to say that the interests of anti-union employees were inadequately represented by the observers representing the Board and the employer and notes that there was no indication that any of the employees were prohibited from examining the eligibility list or from challenging any prospective voter.

Mr. Justice JACKSON filed a dissenting opinion stating that as long as no provision was made affording an adequate opportunity for employees who were opposed to organization to question the ballots cast he would protect their rights by allowing post-election challenges on such grounds as were urged here.

Mr. Justice FRANKFURTER concurred in the result.

The case was argued by Mr. Derhard P. Van Arkel for NLRB; and by Mr. John T. Noonan for Tower Company.

Selective Service—Draft Board May Consult Non-Secret Theological Panel if It Does Not Abdicate its Duty of Decision—Limited Scope of *Habeas Corpus* Where Prejudice Not Shown

Eagles v. *U. S.* ex rel. *Samuels*, 91 L. ed. Adv. Ops. 252; 67 Sup. Ct. Rep. 313; U. S. Law Week 4113 (No. 59, decided December 23, 1946).

Samuels claimed exemption from military service in May, 1942, as a student preparing for the ministry under Sec. 5 (d) of the Selective Service and Training Act. His draft board accordingly classified him IV-D, but in 1944 it reviewed his file as a result of a procedure adopt-

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ed by the New York City Director of Selective Service who exercises within the City the powers of a State Director. For the purpose of advising local boards with regard to educational practices of religious groups the Director established theological panels, one of which consisted of prominent laymen and rabbis of the Jewish faith.

In May, 1944, the local board found Samuels physically qualified for military duty and the Director requested him to appear before the panel which after hearing him advised the Director upon various grounds that he was not "preparing in good faith for a career of service in the practicing rabbinate". The Director requested the local board to reopen Samuels' classification for consideration of the panel's report, but he emphasized that "the responsibility of determining the registrant's classification must rest" with the board.

In August, 1944, the board reclassified Samuels I-A. He was given two hearings, with inspection of the panel's transcript, his classification was continued and was sustained by the appeal board. Again he requested a hearing which was given him but the board refused to change its decision and Samuels was inducted into the Army in October, 1944, or later. Thereupon he filed his petition for *habeas corpus* against the commanding officer at Fort Dix, New Jersey, the petitioner here. The District Court dismissed the writ but the Circuit Court reversed, in reliance on *U. S.* v. *Cain*, 149 F. 2d 338, and directed the court below to "discharge—from military custody, without prejudice".

In the *Cain* case the same seminary was involved as the one attended by Samuels. The Circuit Court said there, (page 341), "It is true that at the hearing upon the writ it appeared that since the war the Seminary had had a suspicious increase in its membership", and it quoted (page 340) from a letter of the board to the City Director that "This premature enrollment of young boys, who are mere high school students in a seminary, is just done to give them the status of Rabbinical students and for no other purpose".

In the instant case the Court granted certiorari to resolve the conflict between these decisions in the Second and Third Circuits and *U. S.* v. *Hearn*, 153 F. 2d 186, in the Fifth Circuit.

Mr. Justice DOUGLAS delivered the opinion of the Court. He dismisses at the outset Samuels' contention that the case became moot because

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of his discharge from the Army by virtue of the very writ involved in the proceedings. He discusses the limited scope of *habeas corpus* in that the writ is not available to review a procedure merely because it contains "potentialities of abuse" or when "the challenged proceeding cannot be said to have been so corrupted as to have made it unfair".

The Circuit Court had held in the *Cain* case that the advice of the panel must be limited to ecclesiastical questions. In advising as to Samuels the panel did not so confine itself and on this point Mr. Justice DOUGLAS remarks: "If a panel is truly expert in the field, its expertness is not necessarily limited to knowledge of the theological schools, the course of training, and the educational practices and traditions. Its acquaintance with the ministry of that faith and with the norms of the profession may well give it special insight into the claims of those seeking exemption...."

The main point for reversal was that the selective service boards were at liberty to employ theological panels in an advisory capacity so long as those boards made the final classification themselves.

The Court holds that Samuels had fair hearings, that he confronted the theological panel face to face, that he was given full freedom to introduce evidence, and that there was evidence to support the board's classification. The judgment was reversed.

The case was argued by Mr. Irving S. Shapiro for Eagles; by Mr. Meyer Kreeger for Samuels.

Criminal Law — Murder — Right of Accused to Be Represented by Counsel — Effect of Waiver

Carter v. *The People of the State of Illinois*, 91 L. ed. Adv. Ops. 157; 67 Sup. Ct. Rep. 216; U. S. Law Week 4059 (No. 36, decided December 9, 1946).

Held (5 to 4) that the right in a criminal case to be represented by counsel may be waived and that when a state provides a remedy for redressing a violation of constitutional rights, that remedy must be exhausted before recourse can be had to the federal courts.

Criminal Law — Freedom of Religion — Trial by Jury — Exclusion of Women from Juries

Ballard v. *United States*, 91 L. ed. Adv. Ops. 195; 67 Sup. Ct. Rep. 261; U. S. Law Week 4049 (No. 37, decided December 9, 1946).

This is the second appearance of this case in the Supreme Court. The former decision was reviewed in 30 A.B.A.J. 349. Here attention is called to the new holding (5 to 4) that where women are excluded from service on the grand jury, the case must be remanded with instructions to dismiss the indictment and not for a new trial.

Mr. Roland Rich Woolley argued the case for the accused and Miss Beatrice Rosenberg argued the case for the Government.

Criminal Law — National Stolen Property Act

United States v. *Sheridan*, 91 L. ed. Adv. Ops. 264; 67 Sup. Ct. Rep. 332; U. S. Law Week 4105 (No. 54 decided December 23, 1946).

Held (7 to 2) that in a prosecution for transporting stolen securities in inter-state commerce forged checks are "securities" within the meaning of the National Stolen Property Act and that the sale and delivery of a forged check payable in another state where it must be presented for payment, amounts to "causing" it to be transported.

The case was argued by Mr. Leon Ulman for Sullivan and by Mr. John H. Pickering for the Government.

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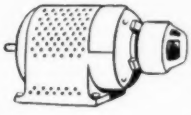

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